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No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

JOSEPH P. DI IORIO,

Petitioner,

vs.

GIBSON & CUSHMAN DREDGING CORP.,

Respondent,

GIBSON & CUSHMAN OF NEW YORK, INC.,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

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QUESTIONS PRESENTED

1) In a General Maritime Law action tried to a jury which renders written answers to interrogatories, which distinguish between past and future losses, is a trial judge permitted to add prejudgment interest, post-verdict, without having previously advised the jury that he would do so?

The Second and Eighth Federal Circuits respond in the affirmative along with one bench of the Fifth Circuit; the other Fifth Circuit bench joins with New York State courts in responding in the negative.

2) In a General Maritime Law action tried to a jury, in which the jury's responses to interrogatories distinguish between past and future losses, is the prejudgment interest to be added as simple or compounded interest?

The Second and Eighth Federal Circuit's response is to apply compound interest. A Fifth Circuit bench applies simple interest. The courts of the State of New York do not respond affirmatively or negatively in terms of interest, because they have never previously granted prejudgment interest in any maritime matter, which is contrary to all other maritime courts that agree that the granting of prejudgment interest is the rule and not the exception.

3) Can New York State impose a substantive statute, New York General Obligations Law Sec. 15-108, in a maritime case, which contravenes federal maritime law on seamen's releases established by *Garrett v. Moore McCormack Co., Inc.,* 317 U.S. 239 and *Monessen Southwestern Railway Co. v. Morgan,* 486 U.S. __, 108 S.Ct. 1837, 100 L.Ed. 2d 349 (1988)?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

OPINIONS BELOW

Petitioner Joseph P. DiIorio seeks certiorari to review the Memorandum Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, dated November 20, 1990, officially reported at 561 N.Y.S.2d 767, reprinted at Appendix N.

The amended judgment, decisions and orders of the lower court are not officially reported and are reprinted at Appendices I, J, K and M.

JURISDICTION

The Order of the New York State Supreme Court, Appellate Division, First Department was entered on November 20, 1990, affirming the amended judgment and orders of the court below.

Petitioner Di Iorio's motion to reargue or for leave to appeal to the New York Court of Appeals was denied by

the Appellate Division, First Department order dated February 7, 1991 (Appendix O).

Petitioner's motion for leave to appeal to the Court of Appeals was dismissed by New York Court of Appeals order dated May 9, 1991 (Appendix P).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York General Obligations Law sec. 15-108 provides:

> *§15-108. Release or covenant not to sue.*
>
> (a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

New York Practice Law and Rules, §§5002-5004 provide:

> *§5002. Interest from verdict, report or decision to judgment.*
>
> Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. The amount of interest shall be computed by the clerk of the court and included in the judgment.

§5003. *Interest upon judgment.*

Every money judgment shall bear interest from the date of its entry. Every order directing the payment of money which has been docketed as a judgment shall bear interest from the date of such docketing.

§5004. *Rate of interest.*

Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.

STATEMENT OF THE CASE

In this maritime case, petitioner, a seaman, seeks review of the November 20, 1990 Appellate Division, First Department order, which denied seaman Di Iorio his right to pre-judgment interest on the judgment from the date of his injury, January 23, 1973, rather than from the date of the liability verdict, October 29, 1987. The order further denied seaman Di Iorio his right to receive $600,000, which was improperly deducted from his judgment, because the trial court erroneously assumed the monies were given to him in exchange for a release furnished by Seaman Di Iorio to his employer. In fact seaman Di Iorio's release had been given in exchange for Maintenance and Cure past and future.

FACTS

Seaman Joseph Di Iorio, age 21, a wiper suffered massive burn-blast personal injuries on January 22, 1973 when the dredge PITTSBURGH's steam turbine oversped and exploded, while engaged in a U.S. Army Corp of Engineers dredging project in the Cape Fear River, Sunny Point Inlet, North Carolina.

Di Iorio's body was cut in half by steel shrapnel. The flesh on his back was melted by live steam. His left shoulder muscle and scapula melted away by the explosion. He suffered massive abdominal evisceration of in-

testines, multiple penetrating wounds and lacerations over his entire body, second and third degree burns, lost all of his blood, and had no pulse. Doctors administered to him and revived him.

Di Iorio continues to suffer permanent partial physical and psychiatric disabilities.

Atlantic Gulf & Pacific Co. (hereinafter referred to as AG&P) owned the dredge PITTSBURGH and was Di Iorio's employer.

Respondent, a "small business," dredging company, was the successful low bidder to the U.S. Army Corp of Engineers and was awarded a federal dredging project specifically set aside only for small businesses of certain financial characteristics. Respondent thereafter subcontracted this project to Atlantic Gulf & Pacific which because of its financial size was originally ineligible to compete for this dredging project. Respondent remained responsible as project operator and safety guarantor.

II. THE PROCEEDINGS BELOW

Respondents successfully achieved favorable jury awards in separate trials involving both liability and damages, the first ending October 28, 1987, and the second on December 29, 1987 (Appendix A and B).

The trial justice in both specific trials persistently rejected General Maritime Law and over strenuous objections by petitioner restricted all of the law throughout the trial to only "land-based negligence law" (Appendix C).

The trial court at the conclusion of the damage trial thereafter unilaterally and without hearing dictated by the doctrine of *Garrett v. Moore-McCormack,* 317 U.S. 239, rejected all tenets of maritime law and applied a New York substantive statute General Obligations Law 15-108 as a basis to reduce the verdict (Appendix C).

An amended judgment was entered (Appendix I) after the reduction of the verdict by the Appellate Division to which petitioner stipulated (Appendix G) and immediately thereafter formally requested the addition of prejudgment interest based upon the maritime law (Appendix J, K, N).

The trial court persistently rejected the introduction of every single maritime law tenet, including the addition of prejudgment interest (Appendix J), and though the trial court recognized that the accident occurred on a floating vessel on navigable waters (Appendix J) at the ocean-going channel for Sunny Point, North Carolina, it persistently applied land-based substantive law of the State of New York (CPLR §§5002-5004) and General Obligations Law §15-108 and refused to resettle the judgment (Appendix J), all of which was contrary to the General Maritime Law.

The Appellate Division's November 20, 1990 order affirmed the lower court's denial of pre-judgment interest and affirmed the $600,000 previously deducted offset performed by the trial court, predicating its appellate decision upon the "law of the case" (June 27, 1989 order).

POINT I

THE GENERAL MARITIME LAW ON PREJUDGMENT INTEREST IN PERSONAL INJURY CASES IS IN DISPUTE AND THEREFORE UNSETTLED IN VARIOUS FEDERAL CIRCUITS AND IN NEW YORK STATE COURTS; THIS COURT NEEDS TO RESOLVE SAME.

The following are the disputed areas ·

(A)

THE FIFTH CIRCUIT EXHIBITS AN INTERNAL DISPUTE, AS TO WHETHER A TRIAL JUDGE MAY ADD PREJUDGMENT INTEREST IN A MARITIME MATTER, POST-JURY VERDICT.

(B)

CONTRAST THE SECOND AND EIGHTH CIRCUITS POSITION ALLOWING THE TRIAL JUDGE TO ADD PREJUDGMENT INTEREST POST-VERDICT WITH THAT OF ONE BENCH OF THE FIFTH CIRCUIT COMPLETELY CONTRARY TO SAME.

(C)

NEW YORK STATE COURTS REJECT THE SECOND CIRCUIT AND EIGHTH CIRCUIT, BUT OPT FOR THE ISOLATED POSITION OF A FIFTH CIRCUIT BENCH PROHIBITING PREJUDGMENT INTEREST POST-VERDICT IN GENERAL MARITIME LAW CASES.

(D)

ALL ADMIRALTY AND MARITIME DECISIONS REQUIRE THAT PREJUDGMENT INTEREST BE COMPOUNDED, BUT NEW YORK STATE COURTS AND AN ISOLATED BENCH OF THE FIFTH CIRCUIT CANNOT RESPOND BECAUSE OF THEIR REFUSAL TO ADD PREJUDGMENT INTEREST POST-VERDICT.

POINT II

NEW YORK STATE REJECTS THE GENERAL MARITIME LAW DOCTRINE OF *GARRETT V. MOORE-McCORMACK*, AND HAS SUBSTITUTED IN PLACE OF SAME ITS OWN SUBSTANTIVE STATUTE, GOL 15-108.

(A)

THE FIFTH CIRCUIT EXHIBITS AN INTERNAL DISPUTE, AS TO WHETHER A TRIAL JUDGE MAY ADD PREJUDGMENT INTEREST IN A MARITIME MATTER, POST-JURY VERDICT.

One bench of the Fifth Circuit Court of Appeals in 1987, *Morales v. Garijak,* 839 F.2d 1355, prohibits the trial judge in a General Maritime Law case involving Maintenance and Cure from adding prejudgment interest post-verdict.

A jury awarded the plaintiff-seaman damages in compensation for the shipowner's refusal to pay Maintenance and Cure.

Prior to 1987, in 1981 the same Fifth Circuit in *Havis v. Petroleum Helicopters,* 664 F.2d 54, in a first opinion, denied prejudgment interest on the identical ground later stated in 1987 in *Morales, supra;* that the jury was not informed that the trial judge would add pre-judgment interest post-verdict.

Therefore, upon the basis of both of these decisions, the Appellate Division, First Department decided a recent matter (1990) *Pires v. Frota Oceanica,* 554 NYS2d 855, 857, and later *Di Iorio v. Gibson & Cushman,* November 20, 1990, 561 NYS2d 767 (Appendix N) and founded its decision to reject the trial court's addition of prejudgment interest upon the grounds that the jury was not informed that the trial judge would add prejudgment interest post-verdict, continuing its prior reliance on *Havis v. Petroleum Helicopters, Inc., supra,* when they supported their decision as follows:

> As the question of pre-judgment interest was not presented to the jury in this maritime personal injury action, the court is without authority to award it. (*Pires v. Frota Oceanica Brasileira, S.A.*,—AD2d—, 554 NYS2d 855, 857; *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54, 55.)

The Appellate Division, New York County was unaware that another Fifth Circuit bench had reversed its prior position in *Havis, supra.* In *Wyatt v. Penrod Drilling,* 735 F.2d 951, (5 Cir. 1984) in footnote 2 the Court of Appeals explained that on a second appeal in *Havis* on remand they had allowed prejudgment interest:

> In an unpublished opinion, this court affirmed the entry of judgment in the *Havis* case on remand for prejudgment interest at the Louisiana legal rate. The defendants had appealed the amended judgment, arguing that the first *Havis* opinion precluded an award of prejudgment interest because the plaintiff had not sought to present the issue to the jury. It does not appear to us that the plaintiff objected to the trial judge's use of the Louisiana legal rate. We decline to consider the unpublished opinion precedent for the proposition that state law governs the disposition of this issue, since such a holding would fly directly in the face of the purpose of restitution and full compensation. This Court believes that compounding the interest annually promotes the spirit and intent of this general rule in admiralty. 28 U.S.C. §1961 has been held applicable to judgments rendered in admiralty, thereby persuading this Court that little justification exists to distinguish between pre-judgment interest and post-judgment interest awards in manner of calculation. See *Gele v. Wilson,* 616 F.2d 146 (5th Cir. 1980); *Flowers Transportation Inc. v. M/V Peanut Hollinger,* 94 F.R.D. 99 (E.D. La. 1982). Accordingly.

Contrast the above with that of a Fifth Circuit decision, *Fisher v. Agios Nicolas,* 628 F.2d 308, at which the

Fifth Circuit though granting prejudgment interest refused to compound same.

Contrast it with a district court decision within the Second Circuit which compounds interest, *Lewis et al. v. Texaco, Inc.*, __ F.Supp. __, (SDNY 1974) 1975 AMC 61, 70:

> Defendant agrees that, if interest is awarded, the proper rate is 6%, pursuant to Section 5-501 of the New York General Obligations Law, but should be simple interest rather than compounded interest. Defendant also agrees that the general rule is that interest is discretionary in admiralty in matters of breach of contract, citing *Scotland,* 118 U.S. 507 (1885). Plaintiffs rely on more recent authority from this Circuit, *e.g., O'Donnell Transportation Co. v. City of New York,* 1954 AMC 1512, 215 F.2d 92, 95 (2 Cir. 1954); *United States v. Panama Transport Co.,* 1958 AMC 830, 253 F.2d 758, 759 (2 Cir. 1958); *Moore-McCormack Lines, Inc. v. Richardson,* 1962 AMC 804, 295 F.2d 583, 592 (2 Cir. 1961); *Lekas & Drivas Inc. v. Goulandris,* 1962 AMC 2366, 306 F.2d 426, 429 (2 Cir. 1962); *Van Nievelt, et al. v. Cargo & Tankship Management Corp.,* 1970 AMC 534, 421 F.2d 1183 (2 Cir. 1970), supporting award of such interest in other kinds of admiralty actions. These cases hold that, unless there are "exceptional circumstances" militating against awarding interest, it should be awarded. The general rule in favor of allowing interest is much stronger where, as in the instant case, the damages are liquidated and are based upon a breach of contract. *Van Nievelt, supra,* 1970 AMC at 536, 421 F.2d at 1185.
>
> Here there are no special circumstances militating against such an award. Plaintiffs have been wrongfully deprived of the use of the money for almost four years. Their counsel acted promptly at every stage of the proceeding. The only way Plaintiffs can be compensated for the delay in payment is through the requested award of 6%

interest per annum. That rate of interest compounded annually is allowed.

Two additional Fifth Circuit cases have compounded interest, *Randolph v. Laeisz,* 896 F.2d 964, and *Todd Shipyards v. Auto Transp.,* 736 F.2d 745.

POINT II

NEW YORK STATE REJECTS THE GENERAL MARITIME LAW DOCTRINE OF *GARRETT V. MOORE-McCORMACK,* AND HAS SUBSTITUTED IN PLACE OF SAME ITS OWN SUBSTANTIVE STATUTE, GOL 15-108.

The trial court in this matter totally and completely rejected any primary maritime doctrines and refused to acknowledge that an explosion which occurred on board a dredge digging a ship channel in Sunny Point, North Carolina was admiralty and maritime in nature, totally in conflict with *Senko v. LaCrosse Dredging,* 352 U.S. 370 (1957).

In the presence of such a hostile courtroom climate which persistently rejected the threshold or basic issue that this accident was a maritime personal injury tort, any mention of secondary maritime issues would have evoked a deluge of virulent and sarcastic criticism from the trial court.

The secondary maritime issues of the *Garrett v. Moore-McCormack* doctrine controlling seamens' releases and any maritime requirement be it statutory or non-statutory requiring the addition of pre-judgment interest were matters which clashed with the trial court's prior ruling that the entire action was non-maritime. Therefore,

the introduction of secondary maritime issues were prohibited from being raised during trial because it would evoke the trial court's hostility against plaintiff and counsel.

The bare trial transcript does not reflect the volume, depth and tone of the trial justice's voice and his intense hostility towards any maritime doctrine. These trial court actions raised an aura of fear within these adversarial proceedings (A 1274) and effectively foreclosed and prohibited the introduction of any secondary maritime doctrines such as Seaman's Releases and prejudgment interest. The transcripts annexed as Appendix Exhibits C, J, K, and M, show the Trial Court's continued rejection of maritime law and hostility to Petitioner's counsel.

The Appellate Division, First Department belatedly recognized on a second appeal that this was a Maritime personal injury tort when they said *"in this maritime personal injury case"* (Appendix N). Despite recognition of the maritime origins and controlling maritime law the Appellate Division refused to invoke any secondary maritime doctrines of prejudgment interest. The Appellate Division, abjectly refused to confront both the issue of the addition of said prejudgment interest and the doctrine of *Garrett v. Moore-McCormack,* 317 U.S. 239 (1942) governing seaman's releases.

Seaman Di Iorio settled his prior claim against his employer Atlantic Gulf & Pacific for $600,000 in 1973. Though the release never mentioned Maintenance and Cure past and future, because seaman Di Iorio's injury was a continuing one which continuously required care and rehabilitation, the payment of $600,000 was in consideration of past and future maintenance.

Instead of the trial court holding a *Garrett* hearing to determine the extent of past and future maintenance due and whether the seaman's release was for same, the trial court immediately invoked New York State substantive law known as General Obligations Law 15-108 and without further hearing or discussion deducted and set-off the entire $600,000 from the verdict seaman Di Iorio recovered against the third-party herein Gibson & Cushman. New York State GOL 15-108 was specifically written for land-tort releases and not seaman's Releases because it immediately presupposes the validity of all releases including seaman's releases. This position clashes directly with this court's decision of *Garrett,* which assumes that the burden is on the party proposing to prove the validity of a seaman's release. The Appellate Division agreed with the lower trial court, though in a different case in another decision, the same Appellate Division recognized the differences and distinctions between a land tort release and one executed by a seaman. In *Gibson v. American Export Lines,* 511 NYS2d 631 (1 Dept. 1987), the Appellate Division explained at length its recognition of the differences:

> Release
>
> As to the general release, it is well established that releases by seamen are subject to careful scrutiny by the courts. The shipowner must establish that the release was freely executed, without deception or coercion, and that it was made only after a full disclosure and with a full understanding of the rights relinquished thereby (*Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 247-48; *Waters v. United States,* 191 F.2d 212, 215; *Bay State Dredging & Contracting Co. v. Porter,* 153 F.2d 827, 833; *The S.S. Standard,* 103 F.2d 437, 438-439; *Spillers v. South Atlantic S.S. Co. of Delaware,* 45 F.Supp. 2, 6-7).

Thus, in *Garrett v. Moore-McCormack Co., supra,* the U.S. Supreme Court, with reference to the validity of a release, held that the shipowner "must affirmatively show that no advantage has been taken; and his burden is particularly heavy where there has been inadequacy of consideration." (317 US at 247) Justice Black, writing for the unanimous court, observed:

"The wardship theory has, as was recognized by the courts below, marked consequence on the treatment given seamen's releases. Such releases are subject to careful scrutiny. "One who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman.' *Harmon v. United States,* 5 Cir: 59 F.2d 372, 373. We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding." (*id.* at 247-248).

The Maritime law is crystal clear, anyone attacking a release has the burden of proving the invalidity of said document.

See the Treatise by Norris, *THE LAW OF SEAMEN,* 4th ed. (1985) Vol. 1, Chapter 24, Seamen's Releases, which explains in detail wherein the burden lies to the proving of the validity of a seaman's release in the following subsections of his treatise:

sec. 24:1 Scrutiny of Releases by Courts of Admiralty.
sec. 24:2 Why Protective Care Given to Seamen.
sec. 24:3 Burden Is Upon One Pleading Release
sec. 24:4 When Is a Seaman Overreached?
sec. 24:5—Intoxication

sec. 24:6 Reliance on Statements of Shipowner or His Agents
sec. 24:7—Reliance on Shipowner's Doctor
sec. 24:8—Reliance on Shipowner's Attorney _
sec. 24:9—Release Not Fully Understood by Seaman

There are a plethora of decisions of all courts including this one which recognize that a seaman's release is not "automatically valid" as determined by New York State substantive law known as General Obligations Law 15-108, and that anyone proposing to gain a benefit from payments made in exchange for a seaman's release has the burden of proving the validity of said release and all facets of same. See *Avery v. U.S.*, 829 F.2d 817; *Blanco v. Moran Shipping Co.*, 483 F.2d 63; *Bodden v. American Offshore, Inc.*, 681 F.2d 319; *Davis v. American Commercial Lines, Inc.*, 823 F.2d 1006; *Leach v. Mon River Towing*, 353 F.Supp. 637; *Ray v. Defelice Marine*, 439 So.2d 1102; *Robertson v. Douglas Steamship Co.*, 510 F.2d 829; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321.

Another trial justice of the Supreme Court, New York County in stark contrast to the decision and position of Justice Gammerman his fellow justice and the Appellate Division, First Department, many years ago recognized in a decision that New York State substantive law known as GOL 15-108 must give way to the Federal Maritime Law on Seaman's Releases because the New York State General Obligations Law is substantive.

Trial Justice Greenfield in his decision of *Public Administrator of the Estate of Famuel Diaz de Souza v. Frota Oceanica Brasileira, S.A., et al., NYLJ, 10/7/81,* similarly held that sec. 15-108 of the General Obligations Law is inapplicable and must give way when confronted by a Seaman's Release controlled by *Garrett v. Moore-McCormack, supra,* 317 U.S. 239.

> The motion is based on General Obligations Law sec. 15-108 which deals solely with the effect of a release given to one or more persons liable or claimed to be liable in tort on claims for the injury against other tort feasors. The statute is irrelevant to the issue of whether releases given by widows of seamen who were lost at sea when the S.S. Sylvia Ossa went down are a defense to the claims brought by the Public Administrator. Moreover, New York law does *not* govern the issue of releases in maritime cases, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

The Appellate Division, First Department has clearly vaccilated in its application of the General Maritime Law when it conflicts with General Obligations Law 15-108.

The First Department discarded GOL 15-108 and applied the General Maritime Law to the benefit of a shipowner in its decision of *Swogger v. Waterman Steamship,* 518 NYS2d 715, (Sup. Ct. NY Co. 1987), 1987 AMC 2679; aff'd 546 NYS2d 80.

Prior to the second Appellate Division review of Di Iorio (November 20, 1990), in a decision of July 8, 1987, the New York State Supreme Court in *Swogger, supra,* cast aside GOL 15-108 at page 2686 of the 1987 AMC version when it said:

> In view of the holding that Federal admiralty law governs here, it is unnecessary to formally consider whether Sealand and PRMMI would be entitled to indemnification under State Law. *However, this court is constrained to observe that under the circumstances here indemnification is not barred by Sec. 15-108 of the General Obligations Law.* (Emphasis added).

On June 27, 1989 (Appendix E), the Di Iorio Appellate Division rejected plaintiff-appellant's argument

that G.O.L. 15-108 conflicts with Maritime law, but within three months, on October 6, 1989, the *Swogger* Appellate Division, First Department made a 180 degree turn. An almost identical bench, presiding in the *Swogger* case, including presiding Justice Francis Murphy, recognized the superior position of the maritime law and rejected GOL 15-108 saying, 546 NYS2d 80 (1 Dept. 1989):

> The third-party defendants moved to dismiss the actions for failure to state a cause of action [C.P.L.R. sec. 3211(a)(7), on the ground that New York General Obligations Law sec. 15-108 bars the actions insofar as they seek contribution, and that indemnity is unavailable on the facts as pleaded.
>
> The Motion Court denied the motions in all respects, holding that Admiralty law rather than New York law applied to the third-party actions, and thus G.O.L. sec. 15-108 did not bar the contribution claims, 186 Misc.2d 410, 518 N.Y.S.2d 715. We affirm.

Prompted by this Appellate Division's decision in *Swogger, supra,* which recognized the inapplicability of the GOL 15-108 in maritime cases involving releases, seaman Di Iorio promptly returned to the trial court in October 1989, and moved to amend the judgment pointing out to the trial justice the Appellate Division's recognition that New York State's substantive law under GOL 15-108 was repugnant to Federal Maritime Law.

Trial Justice Gammerman refused to alter his previous decision that this entire matter was non-maritime and though the second Di Iorio Appellate Division decision dated 11/20/90 (Appendix N) recognized it was maritime, it joined trial Justice Gammerman in evading the issue:

> As to whether $600,000, the amount of the earlier settlement in a related action against a non-party joint tortfeasor, should have been deducted from the damage award, our prior determination is the law of the case. (See *Locilento v. John A. Coleman Catholic High School,* 134 AD2d 39, 43.) In any event, while plaintiff urges that maintenance and cure paid in exchange for a release cannot be deducted from a damage award, there is nothing in this record to suggest that the $600,000 was paid as maintenance and cure, which is "designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service" (*Vaughan v. Atkinson,* 369 U.S. 527, 531); the $600,000 payment was made in connection with a broad general release executed in full settlement of the related action.

This Court should accept and determine this conflict between the General Obligations Law and *Garrett* by not permitting New York State's substantive law (G.O.L. §15-108) to automatically convert a seaman's release to a set-off without a full and complete *Garrett v. Moore-McCormack,* hearing on:

a) the validity of the release, and

b) whether the monies paid in exchange for the release were truly for damages or for Maintenance and Cure.

The second argument is important within the factual context of this case, because the uncontroverted testimony of three physicians at the trial was that fourteen years after the accident, seaman Di Iorio still required additional medical care and treatment (Dr. Mortimer Shapiro, Dr. Harry Sherman and Dr. Lawrence Kaplan).

The maritime doctrine of Maintenance and Cure compels the shipowner to supply medical care and treat-

ment even though many years have elapsed after the event upon which said medical care and treatment is based.

In *Sobosle v. U.S. Steel,* 358 F.2d 944, the Third Circuit Court of Appeals imposed the cost of maintenance and cure for a mental illness contracted by the seaman while in "the service of the ship" twenty years before and said:

> Until such time as the seaman has been afforded such treatment that the medical profession can state that the maximum cure possible has been effected, maintenance and cure must be paid by the shipowner . . . I make this recommendation for the reason that maintenance and cure must continue until every approach reasonably known to medical science is applied in an effort to cure the seaman and if the suggestion is followed, the parties and the court will within a reasonable length of time in the future be able to know the answer to this most unfortunate situation. (Emphasis added)

The medical proof adduced from three physicians on trial, the first two on behalf of Seaman Di Iorio and the last on behalf of the Respondent (Dr. Harry Sherman—(A Vol IV, p. 637-647; 667 (depression, abscess in back left shoulder from spontaneously extruding metal fragments, infection; metal causing ½ inch lump over chest cage; hospital treatment for extruding metal fragments); Dr. Mortimer Shapiro—(A Vol IV, pp. 510-512 (chronic post-traumatic stress disorder); Dr. Lawrence Kaplan (A Vol. IV, pp. 471-473, 477-482) (post-traumatic stress syndrome), all supported Seaman Di Iorio's continued need for medical care and treatment under the maintenance and cure doctrine. Therefore, Petitioner Di Iorio'srgument herein that the release he gave and monies he received were for past and future maintenance and cure and not damages, is cast in concrete.

The First Department rejected the *Garrett* doctrine, and rejected the uncontroverted testimony of the need for Maintenance and Cure over the previous fourteen years prior to trial and avoided their obligation to determine the issues when they said:

> "the $600,000 payment was made in connection with a broad general release executed in full settlement of the related action."

The above statement betrays the sad fact that the Appellate Division failed to comply with its wardship obligation under the Maritime Law and to apply the Maritime Doctrine of Maintenance, Care and Cure. The Appellate Division was obligated to protect Di Iorio as a ward of admiralty and to scrutinize his release in accordance with the Supreme Court's opinion in *Garrett, supra,* and *Vaughan v. Atkinson,* 369 U.S. 527, which though alluded to by the First Department, observance of same was rejected by them when instead of protecting seaman Di Iorio by holding a hearing on his claim, they sought to smother, evade and conceal it.

Justice Freedman writing for the Third Circuit bench in *Sobosle v. U.S. Steel,* 358 F.2d 944, explained the onerous obligation imposed upon all maritime courts by this court in all prior decisions when this court said that all lower courts have an obligation to extend a special solicitude to seamen in evaluating a release transaction:

> "that the conduct of the seaman is viewed with a solicitude much different from the objectivity which prevails in judging transactions between strangers." The First Department totally rejected their obligation.

Obviously the Appellate Division cast aside their obligation to apply the seaman wardship doctrine along with "special solicitude" encompassed thereon when they were obligated to scrutinize this transaction.

Supportive of Petitioner's position that Maintenance and Cure is not damages and should not be set-off or deducted from a damage award is *Guidry v. So. La Contractors,* 614 F.2d 447:

> The jury answered each of these questions in the affirmative. It returned a verdict for Guidry in the amount of $150,000, but found him contributorily negligent to the extent of 9.6%. The district court denied Soloco's claim for a credit for the $75,000 settlement Guidry had received from Messina on the basis that Messina was shielded by the Louisiana Workmen's Compensation Act . . ."

Similarly, in *Benders v. Board of Govs.,* 728 F.Supp. 839, the trial court was confronted with a claim by the State of Rhode Island Workmen's Compensation fund to set off or reduce a settlement by subtracting fund monies.

The federal court in *Benders, supra,* recognized that it was obligated to apply the wardship doctrine as the Supreme Court instructed, an obligation which neither the Di Iorio trial court nor the Appellate Division, observed:

> "The settlement reached between the original plaintiffs and defendant was based on a federal law, the Jones Act, 46 U.S.C. App. Sec. 688. *The purpose behind the passage of the Jones Act is to "benefit and protect seaman who are*

> *peculiarly the wards of admiralty.* Its purpose being to enlarge that protection not to narrow it. Its provisions . . . are to be liberally construed to attain that end." The Arizona v. Anelich, 298 U.S. 110, 123, 1936 AMC 627, 634 (1936) (citations omitted). By seeking to place a lien on this settlement, Administrator Knight potentially takes away federally granted rights from Mr. Benders. The jurisdiction of this Court reaches state officials when the vindication of federal rights is at issue. See Ex Parte Young, 209 U.S. 123 (1908); Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937). It is fully within this Court's jurisdiction to determine whether Administrator Knight's action infringe on a seaman's federally created rights. As relief sought by the plaintiffs is only declaratory and prospective, and if granted, will not have a direct impact on the State of Rhode Island (the workmen's compensation having already been paid), the limits placed on this Court's jurisdiction by Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), are not relevant."

Contrast this court's recognition in *Vaughan v. Atkinson,* 369 U.S. 527, *Cortes v. Baltimore Insular Line,* 287 U.S. 366, *Warren v. U.S.,* 340 U.S. 523, *Fitzgerald v. United States Lines,* 374 U.S. 16; *Aguilar v. Standard Oil,* 318 U.S. 724, of its obligation to protect and not to diminish a seaman's rights, to enlarge the same and not to reduce them.

The Appellate Division, First Department acted in derogation of the Uniform Federal Maritime Law by failing to apply the doctrines of seamen's release and ward of admiralty when it permitted the deduction of monies pursuant to land based New York General Obligations Law 15-108.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review that portion of the order of the New York Supreme Court Appellate Division, First Department which affirmed the amended judgment, thereby denying Petitioner his right to prejudgment interest and to restoration of an amount of $600,000 improperly offset by the trial court.

Respectfully submitted,

KENNETH HELLER
Attorney for Petitioner
335 Broadway, Suite 614
New York, New York 10013
(212) 962-6085

10/29/87
4:00 PM

GAMMERMAN, J.—10/28/8
DI IORIO V GIBSON & CUSHMAN DREDGING CORP.—INDEX #1888-76
QUESTIONS FOR THE JURY

1. Was William Tabbott negligent in the manner in which he performed his supervisory duties under the contract and the Accident Prevention Plan?
YES Unanimous
If the answer to question one is "Yes" answer question two. If the answer to question one is "No" omit question two.

2. Was that negligence a proximate cause of injury to plaintiff?
YES Unanimous

3. Was Julian Morse negligent in the manner in which he carried out his duties under the Accident Prevention Plan?
YES Unanimous
If the answer to question three is "Yes" answer question four. If the answer to question three is "No" omit question four.

4. Was that negligence a proximate cause of injury to plaintiff?
YES Unanimous

5. Was Julian Morse negligent in the manner in which he carried out his duties as chief engineer of the Pittsburgh?
YES Unanimous
If the answer to question five is "Yes" answer question six. If the answer to question five is "No" omit question six.

6. Was that negligence a proximate cause of injury to plaintiff?
YES

Unanimous

s/ Kathy R. Lesley
Mary B. Swingle
Patricia Kline

s/ Roxanne Sway
Nancy E. Shapiro
Marion C. Wood

12/29/87 at 2:20 PM

GAMMERMAN, J.—12/28/87
DI IORIO V GIBSON & CUSHMAN DREDGING—INDEX #1888-76
QUESTIONS FOR THE JURY

Set forth the damages to which plaintiff is entitled for:

(1) Wages losses, to date	$78,696.00 (unanimous)
(2) Future impairment of earning power, if any	$1,500,000.00 (unanimous)
(3) Pain and suffering	$5,000,000 (not unanimous, juror #1 dissented)

SUPREME COURT OF
COUNTY OF NEW YORK: IAS PART 27

JOSEPH P. DI ORIO,

Plaintiff,

-against-

GIBSON & CUSHMAN OF NEW YORK and GIBSON & CUSHMAN DREDGING CORPORATION,

Defendants.

---

60 Centre Street
New York, New York

January 13, 1988

Before:
HONORABLE IRA GAMMERMAN,
Justice.

Appearances:
KENNETH HELLER, ESQ.
Attorney for Plaintiff
335 Broadway
New York, New York
BY: SUSAN HARMON, ESQ., of Counsel

BIGHAM, ENGLAR, JONES & HOUSTON, ESQS.
Attorneys for Defendants
14 Wall Street
New York, New York
BY: ANDRES RUNNE, ESQ., of Counsel
NEIL E. HIGGENS, ESQ., of Counsel

LEONARD INFELD, C.S.R.
Official Court Reporter

THE COURT: Di Orio.

This is a motion brought on by the defendant, Gibson & Cushman Dredging Corporation, seeking an order setting aside a jury verdict obtained by the plaintiff on the issue of damages, and directing a new trial with respect to two awards made by the jury.

My recollection is that the jury made three awards in this case, $78,698 for wage losses to date; $1,500,000 for wage losses or future impairment of earning expenses, or earning power; and $5 million for pain and suffering.

The first two awards were unanimous. There was one juror who dissented in the $5 million award of pain and suffering.

The attorneys for the defendant have submitted a 24-page affidavit, which I have read.

The attorney for the plaintiff has submitted a modest 122-page affidavit, which I can barely lift, which I haven't read. But, inasmuch as I'm relatively familiar with the issues in the case, I feel quite comfortable in making a decision at this point.

If the attorneys for the -- for the purposes of the record -- if the attorneys for the plaintiff -- pardon me -- defendant wish to submit a reply affidavit, such affidavit will be received on or before the 25th.

Is that enough time, eight days?

MR. HIGGENS: That would be fine, your Honor.

THE COURT: Okay.

The motion is addressed to the awards for loss of earnings to date, and pain and suffering.

Let me deal with them in that order: The award of a million and a half dollars for loss of earnings to date can be analyzed really in two ways: If the jury concluded, and we had testimony from two economists, if the jury concluded that the testimony of the plaintiff's economist that the wage increases that the plaintiff would receive in a position of Chief Engineer -- and we have to asume that

the jury was persuaded by the plaintiff's proof that it is more probable than not that the plaintiff would have achieved that position -- if that position would provide increases of eight pereent over a period of time extending to the plaintiff reaching the age of 65, and the inflation rate, which according to that economist was only six percent, the award is indeed a very modest one.

If we just take that award and use it actuarially and indicate that the plaintiff would invest it at six percent, and project it over a period of time of 34 years to the plaintiff's age of 65 and try to determine what amount the plaintiff would receive each year over those 34 years until he reached the age of 65, at which point presumably there would be no interest in principal left, you would have a figure of something in excess of $108 or $9000.

If the jury concluded that the inflation rate and the interest rate remained, were more or less equal, which is a reasonable conclusion, then you would project the award on a flat basis, dividing a million and a half, let's say by thirty years, which I must use, because that's easy, and that gives us $50,000.

If you divide it by more, it's less than $50,000.

The plaintiff is presently earning about $20,000. The testimony was that Chief Engineers earn between $60 to $100,000 at the present time.

Based on that analysis, it is my view that although the award is generous, it is not one which shocks my conscience. It is not one which is not supported by the proof, and I am not going to disturb it.

So the award for a million and a half dollars remains.

The award for $5 million, however, in my view, is clearly excessive.

The plaintiff sustained, without a doubt, very, very serious injuries. He did, however, make a remarkable recovery from the most serious of his injuries, which was the injury to his intestine and urinary bladder, and, indeed, he's made a remarkable recovery with respect to the

injury to his left shoulder. He's left with no impairment or no substantial impairment of motion of the shoulder, but does have, apparently without dispute, substantial weakness of the left shoulder which interferes with his ability to use his left arm.

He is left with a rather significant scarring across his back, and based on the testimony, viewed in the light most favorable to the plaintiff, with a permanent psychological injury.

In view of the seriousness of the injuries, he's, obviously, in my view, entitled to substantial damages for pain and suffering.

Based upon the decisional law both of the trial and the Appellate Courts, and my own rulings in the past with respect to pain and suffering, it is my view that an award of one and a half million dollars would be the maximum amount that would be not excessive in this case.

Thus, I'm going to grant the motion and set aside the award for pain and suffering, unless the plaintiff, within fifteen days, files a written stipulation agreeing to enter judgment for the reduced amount. The reduced amount would be $3,078,968, less $600,000, which is the amount which the plaintiff received in settlement of the action instituted against his employer.

MR. HIGGENS: May I be heard, your Honor?

THE COURT: Yes.

MR. HIGGENS: Concerning the Court's comments as to the future impairment of earning capacity, it is the position of the defendant --

THE COURT: Don't say anything that is in your papers. It is not necessary to repeat anything in your papers.

MR. HIGGENS: Not just to repeat, but we take exception on the grounds that the assumptions that were relied on by plaintiff's witnesses were not grounded in fact.

THE COURT: That was for the jury to determine.

I'm not going to substitute any -- if I were the trier of the fact, I might have come to a different conclusion, but I wasn't the trier of the fact. You people decided to try this case through a jury, and the jury made that determination, and the jury was, in my opinion, well within its right to make that determination, based on the evidence that was produced.

MR. HIGGENS: We take exception, and we disagree, because we feel that a fair interpretation of the evidence will reveal that type of an award, based upon any reasonable inference drawn from the proof adduced at trial, based upon the assumptions that plaintiff's witnesses testified to, were not grounded in fact, or ever borne out during the course of the trial.

We also take exception to the Court's awarding of $1.5 million as to pain and suffering, which we feel is still clearly excessive, in light of the moderate partial disability, which the weight of the evidence shows that Mr. Di Orio sustained, and that a more appropriate figure would be $400,000.

THE COURT: Which is the figure suggested by Mr. Runne to the jury on his summation, which figure was rejected by the jury?

Do you want to add anything, Mr. Heller?

MR. HELLER: Yes, your Honor.

I respectfully except, I respectfull except, and I'd like to argue on the record a few points, and I'd also like the Court's permission to stay this, so that we can go up to the Appellate Division.

THE COURT: The application for a stay is denied.

And if you advise me now that you do not intend to file a stipulation in writing agreeing to enter a judgment for the reduced amount, if you tell me that now, you are going to pick a jury on Monday -- on Tuesday. Pardon me.

MR. HELLER: May I go on the record, with all due respect?

THE COURT: I'll give you a week to go to the Appellate Division to get a stay.

MR. HELLER: Why don't you listen for just a monute, your Honor?

THE COURT: Yes.

MR. HELLER: Because I see you haven't had an opportunity to read the papers.

THE COURT: I didn't read your papers.

MR. HELLER. Yes.

All right. First of all, the motion to set aside the verdict was defective procedurally and substantively.

Your Honor and I both agree, and we all agreed this is a maritime case. 4404, 5, and 6, are not applicable in a maritime case, because their outcome determinative -- and it is governed by Federal Maritime law which says --

THE COURT: I don't think this is a maritime case at all. I indicated that when the case was tried on liability. But let's go ahead.

MR. HELLER: Let me finish, your Honor, and then you'll see why. All right?

THE COURT: Go ahead.

MR. HELLER: I don't argue for no reason at all.

Look, 4404, 4405, and 4406 are State Procedural Statutes which are outcome determinative, and in view of the fact that they are outcome determinative, they conflict with the Federal Maritime laws for setting aside jury verdicts or remittors.

Now, I've signed to the Court all of the cases in which State procedural statutes have to give way under the Federal Maritime, law, and the Court, on the record, has made a determination to remit this verdict based on State procedural law; therefore, the application is procedurally and substantively defective to set aside the verdict.

Secondly, the Court is prohibited, with all due respect, prohibited from using any comparisons with any other verdicts.

Thirdly, the degree or scale or yardstick to be used in remittors in Federal Maritime cases is, is that verdict within the universe of personal injury verdicts? That is the degree.

The Court did not use that. The motion itself being procedurally and substantively defective must be denied out of hand.

Now, your Honor, I want to address myself to the General Obligations Law, with all due respect to you.

THE COURT: Forget about the General Obligations Law. On the record you and Mr. Healy stipulated, irrespective of what the General Obligations Law provides, and with respect of what the Maritime Law, should it be applicable, provides, there was a stipulation, and if you get the transcript of the earlier case, you'll see, there was a stipulation under the terms of which both you and Mr. Healy agreed that any recovery obtained in this case would be reduced by $600,000. The settlement with Atlantic Gulf and Pacific.

MR. HELLER: With all due respect to your Honor --

THE COURT: Yes?

MR. HELLER: -- I'd like to see that, because I agreed that $600,000 was paid, but --

THE COURT: You agreed.

You can get the transcript --

MR. HELLER: I'll get the transcript. Where do you say it is in the transcript?

THE COURT: You'll find it. There was a discussion --

MR. HELLER: -- because I don't have --

THE COURT: My recollection is that it was a discussion before the charge, the pre-charge discussion, at which time that stipulation was entered into.

MR. HELLER: I will look for it, your Honor.

THE COURT: Very well.

MR. HELLER: But if it's not in there, if it says that we agreed that there was $600,000 paid, I want to bring to your Honor's attention that the General Obligations Law is not applicable to a maritime case --

THE COURT: Mr. Heller, let's cut this short.

MR. HELLER: Well --

THE COURT: Mr. Heller --

MR. HELLER: -- you've got to give me a chance.

THE COURT: If you tell me that you're not going to enter a judgment for $2,478,968, if you told me you're not going to do that, I'm going to set this case down for a trial. And if you want to get a stay, you go to the Appellate Division.

Now, please tell me, so I can make plans for my trial calendar.

MR. HELLER: All right.

Your Honor, I want to have permission to take this, as a question of law, to the Appellate Division.

THE COURT: Mr. Heller, I'll give you that, but you have to get --

MR. HELLER: Judge, you have to give me the courtesy --

THE COURT: Let me finish. You have to get a stay from the Appellate Division.

MR. HELLER: Yes.

THE COURT: I'm sufficiently confident in the correctness of my decision that to delay the disposition of this case.

This is a case that arose from an accident in 1973. The action was started in 1976. It is the oldest case on my calendar. I'm not going to delay its disposition any further.

You either tell me now --

MR. HELLER: I won't, your Honor --

THE COURT: Well, let me finish.

MR. HELLER: I'm going to make up my mind.

THE COURT: Oh, fine. I'll give you fifteen days.

MR. HELLER: All right.

You're giving me fifteen days?

THE COURT: I'm going to put it down for trial.

MR. HELLER: Your Honor --

THE COURT: Let me finish so you'll hear.

I'm going to give you a date to pick a jury.

MR. HELLER: Now --

THE COURT: Just a minute.

You're going to pick a jury on January 28th, unless either of two things occur.

MR. HELLER: Right.

THE COURT: Unless you file a written stipulation agreeing to enter a judgment for the amount that I've indicated, $2,478,968, or you get a stay from the Appellate Division.

MR. HELLER: We understand each other.

THE COURT: See you on the 28th.

MR. HIGGENS: Your Honor, just one or two more items.

MR. HELLER: Oh, wait a minute.

Your Honor, they are going to serve some papers. We need time.

THE COURT: You're not going to need time, because I'm not going to take any. Their papers are for the record only. I've decided this case.

MR. HELLER: So I have fifteen days to get to the Appellate Division?

THE COURT: No.

Let me say this: On the 28th you are to appear here --

MR. HELLER: Right.

THE COURT: -- prepared to pick a jury, unless you have either a stay or you have found a stipulation agreeing to enter a judgment in the reduced amount.

MR. HELLER: I understand.

MR. HIGGENS: Just one or two --

THE COURT: Yes.

MR. HIGGENS: Just one or two more housekeeping items.

THE COURT: Yes.

MR. HIGGENS: I want the record to reflect that Mr. Heller, as of yet, has failed to serve his papers in accordance with this Court's order of December 29th.

THE COURT: You're going -- I'm giving you --

MR. HIGGENS: I understand.

THE COURT: I'll tell you what, I'll tell you what, let me give you the papers.

Mr. Heller, I take it this in on a word processor?

MR. HELLER: Yes.

THE COURT: Run off another copy for the Court.

MR. HELLER: Yes, your Honor. We'll deliver it tomorrow, your Honor.

THE COURT: Any time you want.

MR. HELLER: Okay.

MR. HIGGENS: And, finally, I'd just like the record to reflect --

THE COURT: Let the record reflect that I've given the papers provided to the Court to the attorney for the defendant. Mr. Heller will provide the Court with another copy of his 122-page affidavit.

MR. HELLER: Yes, sir.

MR. HIGGENS: Am I correct that the motion papers here are part of the trial record, your Honor?

THE COURT: They are part of a motion. Everything that's been submitted is part of the record.

MR. RUNNE: I'm not exactly sure when to make this application.

THE COURT: What's your application?

MR. RUNNE: I don't know when Mr. Heller is going to enter a judgment, or if he's going to.

THE COURT: There is no stay.

I understand that there is no insurance in excess of $250,000. There is no stay.

MR. RUNNE: I understant from my clients --

THE COURT: No stay of execution.

MR. RUNNE: Your Honor, I understand, from my clients, that Mr. Heller has been talking to them directly and trying --

THE COURT: Let me say this, so the record is clear: Mr. Heller advised the Court that he received a telephone call from the firm of Rogers and Wells, on behalf of your client. Or on behalf of one party, apparently the defendant corporation is owned by a family trust. There are various members of the family who are represented by one member represented by Rogers and Wells, according to Mr. Heller, one member represented by Paul, Weiss.

MR. HELLER: Paul, Weiss, right, your Honor.

THE COURT: There was a conference at the Harvard Club.

MR. HELLER: Yes.

THE COURT: -- between Mr. Heller and attorneys for those two law firms, and Mr. Reich -- is that his name?

MR. HELLER: Mr. Reich.

THE COURT: -- who was General Counsel to the corporation --

MR. HELLER: Well, no, each one is counsel to each member of the family.

THE COURT: Who is Mr. Reich counsel to?

MR. HELLER: Jeffrey Corroad.

THE COURT: Okay.

MR. HELLER: And Mr. Racroon is counsel to one of the young ladies that's a member of the firm.

THE COURT: Mr. Racroon is from what firm?

MR. HELLER: Paul, Weiss, your Honor. And Rogers and Wells --

THE COURT: It's the R-i-k-o-o-n.

Go ahead.

MR. RUNNE: Your Honor --

THE COURT: Let the record reflect Mr. Rikoon is my second cousin. That's how I know his name.

MR. HELLER: He told me.

THE COURT: Okay.

MR. HELLER: He told me.

THE COURT: Okay.

MR. HELLER: He told you what happened?

THE COURT: He didn't tell me. I haven't seen him in years.

MR. RUNNE: Your Honor, in view of the fact that the judgment is still in excess of $3 million, this will, obviously, put the corporation into bankruptcy.

THE COURT: If the corporation files for bankruptcy, that automatically stays execution. So you don't need a stay from me. You get a stay automoatically from the Bankruptcy Court.

MR. HIGGENS: The company would obviously not like to go bankrupt.

THE COURT: Then file --look, they can either go bankrupt, they can work out some arrangement with Mr. Heller, or they can file a bond.

Absent those three alternatives, Mr. Heller is free to execute on the judgment, assuming that he -- look, if Mr. Heller proceeds to the Appellate Division and gets a stay and doesn't enter a judgment, the corporation doesn't have to worry. It's going to be years before there is any judgment that Mr. Heller is going to execute.

MR. RUNNE: Mr. Heller is not a fool. He knows what he's going to do.

THE COURT: I know what he's going to do. I think he's playing games at the moment, but let him play his games.

MR. RUNNE: But in view of the fact that he's playing games, your Honor, why not grant Gibson & Cushman --

THE COURT: There is no judgment.

MR. RUNNE: But there will be.

THE COURT: When there is a judgment, then Gibson is going to have to make a decision as to what it wants to do.

MR. RUNNE: But why not grant them some time to help them make that decision, your Honor? That's the problem here.

THE COURT: Well, will they consent that as a condition of the stay, and it will be a very short one, they will transfer or encumber no assets?

MR. HIGGENS: You mean they will not transfer?

THE COURT: Will they agree that they will transfer or encumber no assets?

MR. RUNNE: They wouldn't dream of doing something like that.

THE COURT: Well, somehow some defendants do that.

Now, I know Gibson & Cushman doesn't dream of it, but it happens in this world. Mr. Runne, you're aware of that?

MR. HIGGENS: There is no market for any of the assets this company has. They can't sell them if they wanted to.

MR. RUNNE: In fact, Mr. Heller --

THE COURT: Nobody wants to buy a dredge?

MR. HIGGENS: Industry is dead.

THE COURT: All right.

In any event, if they --

MR. HELLER: We want to get going on our papers.

THE COURT: At this point, I'm not going to grant

the stay. Based on what Mr. Heller does, you can make any application you want.

MR. HELLER: I'll report back to your Honor as soon as possible.

THE COURT: Thank you.

See you on the 28th or before.

MR. HELLER: Thank you very much.

- - - - - -

THE FOREGOING IS CERTIFIED to be a true and accurate transcript of the within proceedings.

LEONARD INFELD, C.S.R.
Official Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOSEPH P. DiIORIO,

Plaintiff,

-against-

GIBSON & CUSHMAN OF NEW YORK, INC.,
and GIBSON & CUSHMAN DREDGING CORP.,

Defendants.

INDEX NO. 1888/76
CALENDAR NO. 69200

JUDGMENT AND
TRIAL COSTS

The above-entitled action having duly come on for a bifurcated trial on liability only, before the Honorable Justice Ira Gammerman and a jury at IAS Part 27 of the Supreme Court, held in and for the County of New York at the courthouse located at 60 Centre Street, New York, New York, on October 21, 22, 23, 26, 28, and 29, 1987, and the plaintiff having appeared by Kenneth Heller, attorney for plaintiff, and the defendants having appeared by Thomas Healey, attorney for all defendants, and the liability issues having been duly tried, and during the course of the trial, the Court having dismissed all causes of

action against defendant Gibson & Cushman of New York, Inc.; and

The jury having rendered a unanimous verdict in favor of plaintiff against defendant on liability on all six questions for the jury on October 29, 1987; and

The above entitled action having come on for a trial on damages only, before the Honorable Justice Ira Gammerman and a jury at IAS Part 27, on December 16, 17, 18, 21, 22, 23, 24, 28, and 29, 1987, and the plaintiff having appeared by Kenneth Heller, attorney for plaintiff, and the defendant having appeared by Bigham, Englar, Jones & Houston, attorney for defendant, and the damage issues having been duly tried; and

The jury having rendered a verdict on damages in favor of plaintiff againt defendant, as follows:

1. wage losses, to date: $78,696.00 (unanimous):

2. future impairment of earning power, if any: $1,500,000.00 (unanimous]:

3. pain and suffering: $5,000,000.00 (five to one):

for a total damage verdict of $6,578,696.00; and

The Court having granted in part and denied in part defendants' Motion, pursuant to CPLR 4404, 4405, and 4406, to set aside the jury verdict as excessive and for a new trial by Order dated January 13, 1988, as follows:

1. reducing the jury's award of pain and suffering to $1,500,000.00;

2. reducing the total jury verdict, pursuant to New York General Obligations Law, the sum of $600,000.00, representing recovery by settlement by plaintiff in a separate action;

3. affirming the jury's award of wage losses to date of $78,696.00;

4. affirming the jury's award of future impairment of earning power of $1,500,000.00; and

5. ordering plaintiff to accept the court-ordered remittitur within 15 days, by January 28, 1988, or to appear for new trial on January 28, 1988, absent a stay of trial from the Appellate Division, First Department; and

The plaintiff, through his attorney, Kenneth Heller, Esq., having served and filed a Consent to Remittitur, dated January 20, 1988;

Now, on Motion of KENNETH HELLER, attorney for the plaintiff herein, it is

ADJUDGED that the causes of action of plaintiff against defendant Gibson & Cushman of New York, Inc. are dismissed; and it is further

ADJUDGED that plaintiff JOSEPH P. DiIORIO have judgment and recover against defendant GIBSON & CUSHMAN DREDGING CORPORATION on the liability verdict dated October 29, 1987, and on the damage verdict dated December 29, 1987, as remitted by the Court in its Order dated January 13, 1988, and consented to by plaintiff on January 20, 1988, the sum of TWO MILLION FOUR HUNDRED SEVENTY-EIGHT THOUSAND SIX HUNDRED NINETY-SIX DOLLARS AND NO CENTS ($2,478,696.00), together with the sum

of $61,347.73, representing interest thereon from October 29, 1987, together with the sum of $570.00 for costs and disbursements as taxed, making the total sum of $2,540,613.73, and that plaintiff Joseph P. DiIorio have execution therefore.

Dated: New York, New York
February 8, 1988

NORMAN GOODMAN
Clerk

To: Joseph P. DiIorio
c/o Kenneth Heller, Esq.
Attorney for Plaintiff
335 Broadway, Room 614
New York, New York 10013

Gibson & Cushman Dredging Corporation
c/o Bigham Englar Jones & Houston
Attorney for Defendant
14 Wall Street
New York, New York 10005
(212) 732-4646

Gibson & Cushman Dredging Corporation
Defendants
38 Homan Avenue
Bay Shore, New York

Appellate Division of the Supreme Court First Judicial Department in the County of New York, on June 27, 1989.

Present-Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
Bentley Kassal
George Bundy Smith, Justices.

Joseph P. DiIorio,

Plaintiff-Appellant-Respondent,

-against-

Gibson & Cushman of New York, Inc.,

Defendant,

-and-

Gibson & Cushman Dredging Corporation,

Defendant-Respondent-Appellant.

37146-47-48

Cross-appeals having been taken to this Court by the above-named appellants, from an order of the Supreme Court, New York County (Ira Gammerman, J.), entered on December 1, 1987; and order of said court entered on January 25, 1988, and a judgment of said court entered thereon on February 8, 1988, respectively,

And said cross-appeals having been argued by Kenneth Heller, of counsel for the plaintiff-appellant-respondent, and by Ignatius John Melito, of counsel for the defendant-respondent-appellant; and due deliberation

having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order entered on January 25, 1988 and the judgment entered thereon on February 8, 1988, be and the same hereby are modified, on the law and the facts, and a new trial ordered on the issue of damages only, unless plaintiff, within 20 days after service upon his attorney of a copy of this order, with notice of entry, serves and files in the office of the clerk of the trial court a written stipulation consenting to reduce the award for future earnings to $750,000 and to the entry of an amended judgment in accordance therewith and, as thus modified, said order and judgment are otherwise affirmed, without costs and without disbursements. If plaintiff so stipulates, the orders so appealed from, as amended, are affirmed, without costs and without disbursements. The appeal from the order entered on December 1, 1987, is dismissed, without costs and without disbursements, as having been superseded by the appeal from the January 25, 1988 order and February 8, 1988 judgment.

ENTER:

FRANCIS X. GALDI
DEPUTY Clerk.

Murphy, P.J., Sullivan, Kassal, Smith, JJ.

37146- Joseph P. Dilorio,
37147- Plaintiff-Appellant-Respondent, K. Heller
37148 -against-

Gibson & Cushman of New York, Inc.,
Defendant,

-and-

Gibson & Cushman Dredging Corporation,
Defendant-Respondent-Appellant. I.J. Melito

Order and judgment, Supreme Court, New York County (Ira Gammerman, J.), entered on January 25, 1988 and February 8, 1988, respectively, unanimously modified, on the law and the facts, and a new trial ordered on the issue of damages only, unless plaintiff, within 20 days after service upon his attorney of a copy of the order herein, with notice of entry, serves and files in the office of the clerk of the trial court a written stipulation consenting to reduce the award for future earnings to $750,000 and to the entry of an amended judgment in accordance therewith and, as thus modified, said order and judgment are otherwise affirmed, without costs or disbursements. If plaintiff so stipulates the order and judgment as amended are affirmed without costs and disbursements. The appeal from the order entered on December 1, 1987 is dismissed without costs and disbursements as having been superseded by the appeal from the January 25, 1988 order and February 8, 1988 judgment.

After review of the record, the damages awarded for future earnings apear to us to be excessive to the extent indicated. We believe that the award was based, in large measure, on the highly speculative and dubious claim that, but for the accident, plaintiff, a 21 year-old dredge oiler without any formal education, would have been elevated to the position of chief engineer on a deep sea vessel, earn-

ing upwards of $100,000 per year for only six months of work. This record does not support such a claim or award.

We have considered the other issues raised by these cross-appeals and find that they are without merit.

Order filed.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 19, 1989

Present-Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
Bentley Kassal
George Bundy Smith, Justices.

Joseph P. DiIorio,

Plaintiff-Appellant-Respondent,

-against-

Gibson & Cushman of New York, Inc.,

Defendant,

-and-

Gibson & Cushman Dredging Corporation,

Defendant-Respondent-Appellant.

M-3388
&
M-3530

Plaintiff-appellant-respondent having moved for a stay of this Court's order entered on June 27, 1989, and for reargument of, or in the alternative, leave to appeal to the Court of Appeals from the aforesaid order,

And defendant-respondent-appellant having cross-moved for reargument of, or in the alternative, leave to appeal to the Court of Appeals from the aforementioned order,

Now, upon reading and filing the papers with respect to said motion and cross-motion, and due deliberation having been had thereon,

It is ordered that the motion and the cross-motion be and the same hereby are denied in their entirety.

ENTER:
FRANCIS X. GALDI

Clerk.

SUPREME COURT OF THE
COUNTY OF NEW YORK

JOSEPH P. DI IORIO,

Plaintiff,

-against-

GIBSON & CUSHMAN OF NEW YORK, INC.,
and GIBSON & CUSHMAN DREDGING CORP.,

Defendants.

Index No. 1888/76

Calendar No. 69200

STIPULATION TO
REMITTITUR OF LOST
FUTURE EARNINGS AND
ENTRY OF AMENDED
JUDGMENT.

Plaintiff hereby stipulates, pursuant to the June 27, 1989 Order of the Appellate Division, First Department (Exhibit1) to amend the judgment entered and filed in the Office of the County Clerk of New York County on February 8, 1988 (Exhibit 2) as follows:

1. Item 1 on page 3 of the aforesaid Judgment, the award of pain and suffering, is affirmed in the sum of $1,500,000.00.

2. Item 2 on page 3 of the aforesaid Judgment, reduction of the total jury verdict pursuant to the New York General Obligations Law, is affirmed in the sum of $600,000. Reduction in the sum of $600,000 paid on 11/22/75, therefore interest accrues from the date of the accident on 1/22/73, to 11/22/75, at the yearly average of the "90-Day T-Bill rate" for the calendar year, in the sum of $126,827.00 (Exhibit 3).

3. Item 3 on page 3 of the aforesaid Judgment, the award of wage losses to date (past earnings) is affirmed in the sum of $78,696.00;

4. Item 4 on page 3 of the aforesaid Judgment, award of future impairment of earning power (future earnings) is reduced from the sum of $1,500,000.00 to the sum of $750,000.00, and plaintiff accepts this amount;

5. The award of $570.00 for costs and disbursements as taxed on page 4 of the aforesaid Judgment is stricken and there shall be no award for costs or disbursements;

6. Pre-damage verdict interest on the total of paragraphs 1, 2 and 3 *suprs*, i.e., on the sum of $978,696.00 at the yearly average of the "90-day T-Bill rate" per calendar year from January 22, 1973 to December 29, 1987 inclusive, is awarded to plaintiff in the sum of $2,158,548.00 (Exhibit 3)

7. Post-damage verdict interest on the total of paragraphs 1, 2, 3, 4 and 6, *supra*, i.e., on the sum of $3,887,244.00 at the yearly average of the "90-day T-Bill" rate per calendar year from December 30, 1987 to September 28, 1989, is awarded to plaintiff in the sum of $449,964.00;

8. The total judgment award to plaintiff is the sum of paragraphs 1-4, inclusive, and 6-7, inclusive, i.e., the sum of $4,514,034.00; and

9. Plaintiff may enter an amended judgment in accordance with the terms of this stipulation and with the February 8, 1988 judgment.

Dated: New York, New York
September 28, 1989

KENNETH HELLER

TO: SIFF, ROSEN & PARKER
Attorneys for Defendants
233 Broadway
New York, New York 10279
(212) 238-8400

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

September 29, 1989

Mr. Kenneth Heller
335 Broadway, Room 614
New York, NY 10013

Re: Joseph P. DiIorio,
v. Gibson & Cushman Dredging
Corporation
Application No. A-244

Dear Mr. Heller:

The application for a stay pending timely filing and disposition of petition for writ of certiorari in the above-entitled case has been presented to Justice Marshall, who on September 29, 1989 endorsed thereon the following:

"Application Denied
Thurgood Marshall
9/29/89"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
BY

Francis J. Lorson
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

NOTIFICATION LIST

Mr. Kenneth Heller
335 Broadway, Room 614
New York, Ny 10013

Siff, Rosen & Parker, P.C.
233 Broadway
New York, NY 10279

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOSEPH P. DI IORIO,

Plaintiff,

-against-

GIBSON & CUSHMAN OF NEW YORK, INC.,
and GIBSON & CUSHMAN DREDGING CORP.,

Defendants.

Index No.: 1888/76

CALENDAR NO. 69200

COUNTER-PROPOSED
AMENDED JUDGMENT

The above-entitled action having duly come on for a bifurcated trial on liability only, before the Honorable Justice Ira Gammerman and a jury at IAS Part 27 of the Supreme Court, held in and for the County of New York at the courthouse located at 60 Centre Street, New York, New York, on October 21, 22, 23, 26, 28, and 29, 1987, and the plaintiff having appeared by Kenneth Heller, attorney for plaintiff, and the defendants having appeared by Thomas Healey, attorney for all defendants, and the liability issues having been duly tried, and during the course of the trial, the Court having dismissed all causes of action against defendant Gibson & Cushman of New York, Inc.; and

The jury having rendered a unanimous verdict in favor of plaintiff against defendant on liability on all six questions for the jury on October 29, 1987; and

The above entitled action having come on for a trial on damages only, before the Honorable Justice Ira Gammerman and a jury, at IAS Part 27, on December 16, 17, 18, 21, 23, 24, 28, and 29, 1987, and the plaintiff having appeared by Kenneth Heller, attorney for plaintiff, and the defendants having appeared by Bigham, Engler, Jones & Houston, attorney for defendants, and the damage isues having been duly tried; and

The jury having rendered a verdict on damages in favor of plaintiff against defendants, as follows:

1. wage losses, to date: $78,696.00 (unanimous);

2. future impairment of earning power, if any: $1,500,000.00 (unanimous);

3. pain and suffering: $5,000,000.00 (five to one); for a total damage verdict of $6,578,696.00; and

The Court having granted in part and denied in part defendants' Motion, pursuant to CPLR 4404, 4405 and 4406, to set aside the jury verdict as excessive and for a new trial by Order dated January 13, 1988, as follows:

1. reducing the jury's award on pain and suffering to $1,500,000.00;

2. reducing the total jury verdict, pursuant to New York General Obligations Law, the sum of $600,000.00 representing recovery by settlement by plaintiff in a separate action;

3. affirming the jury's award of wage losses to date of $78,696.00;

4. affirming the jury's award of future impairment of earning power of $1,500,000.00 and

5. ordering plaintiff to accept the court-ordered remittitur within 15 days, by January 28, 1988, or to appear for new trial on January 28, 1988, absent a stay of trial from the Appellate Division, First Department; and

The plaintiff, through his attorney, Kenneth Heller, Esq., having served and filed a Consent to Remittitur, dated January 20, 1988; and

The parties having appealed the December 1, 1987 and January 25, 1988 orders of Justice Gammerman, and the February 8, 1988 judgment to the Appellate Division, First Department; and

The Appellate Division, First Department having issued an order, dated June 27, 1989, dismissing the appeal from the December 1, 1987 order without costs and without disbursements; and modifying the order entered January 25, 1988 and the judgment entered February 8, 1988, on the law and facts, by ordering a new trial on damages only unless plaintiff stipulates consent to reduction of the jury's award for loss of future earnings to $750,000; and

The plaintiff, through his attorney Kenneth Heller, Esq., having served and filed a Stipulation dated September 28, 1989, consenting to a remittitur to the sum of $750,000.00 of lost future earning and entry of an amended judgment;

Now, on motion of Siff, Rosen & Parker, P.C., attorneys for defendant Gibson & Cushman Dredging Corporation herein, it is

ADJUDGED that the causes of action of plaintiff against defendant GIBSON & CUSHMAN OF NEW YORK, INC. are dismissed; and it is further

ADJUDGED that plaintiff JOSEPH P. DI IORIO have judgment and recover against defendant GIBSON & CUSHMAN DREDGING CORPORATION on the liability verdict dated October 29, 1987, and on the damage verdict dated December 29, 1987, as remitted by the Court in its Order dated January 13, 1988, and consented to by plaintiff on January 20, 1988, and as remitted pursuant to the June 27, 1989 order of the Appellate Division, First Department, consented to by plaintiff on September 28, 1989, the sum of ONE MILLION SEVEN HUNDRED TWENTY EIGHT THOUSAND SIX HUNDRED NINETY SIX DOLLARS AND 00/100 ($1,728,696.00), together with the sum of $300,935.18, representing interest thereon from October 29, 1987, together with the sum of $570.00 for costs and disbursements as taxed, making the total of $2,030,201.18, and that plaintiff Joseph P. Di Iorio have execution therefore.

Dated: New York, New York
October 5, 1989

IRA GAMMERMAN
Justice

To: JOSEPH P. DI IORIO
c/o Kenneth Heller, Esq.
Attorney for Plaintiff
335 Broadway, Room 614
New York, New York 10010

GIBSON & CUSHMAN DREDGING CORPORATION
c/o Siff, Rosen & Parker, P.C.
233 Broadway
New York, New York 10279
(212) 238-8400

GIBSON & CUSHMAN DREDGING CORPORATION
Defendant
38 Homan Avenue
Bay Shore, New York

FILED
October 12, 1989
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 27

JOSEPH P. Di IORIO

Plaintiff,

-against-

GIBSON & CUSHMAN OF NEW YORK INC.
AND GIBSON & CUSHMAN DREDGING CORP.,

Defendants.

INDEX
1888/76

60 Centre Street
New York, New York
October 5, 1989

Before:

HONORABLE IRA GAMMERMAN,

Justice

Appearances:

KENNETH HELLER, ESQ.
Attorneys for Plaintiff
355 Broadway
New York, New York 10013

SIFF, ROSEN & PARKER, P.C.
Attorneys for Defendants
233 Broadway
New York, New York 10279
BY: IGNATIUS JOHN MELITO, ESQ.

DAVID CHODOS
Court Reporter

THE COURT: As I understand it, the plaintiff is making an application for prejudgment interest on the basis that this is a maritime case and takes the position and offers authority that the Court has discretion in a maritime personal injury case to award prejudgment interest, is that correct, Mr. Heller?

MR. HELLER: Partially so and partially not.

THE COURT: Tell me where I am wrong.

MR. HELLER: Partially you are right in that it is a maritime case because it happened on a vessel in navigable waters and that's understood and I gave your Honor and I gave my friend here--

THE COURT: Don't tell me what I am right about, tell me what I am wrong about.

MR. HELLER: It is not discretionary, your Honor, it is discretionary as far as the interest rate whether you compound it or simple and all the cases I furnished to your Honor point out that it is the rule not the exception.

THE COURT: No, no. I read the cases and my conclusion is that it is discretionary.

MR. HELLER: May I respectfully except?

THE COURT: All right. Find me a case that tells me that a judge must award prejudgment interest.

MR. HELLER: Well, your Honor, I furnished your Honor with a memorandum--

THE COURT: No, just give me one case and I will look at it. I read your cases and my conclusion is that it is discretionary and that the court should indicate whether it

is going to award prejudgment interest and if it is, why, and if it is not, why.

Now, show me one case in which it has been held that the judge has no discretion in that area, prejudgment interest must be awarded.

MR. HELLER: Webster versus Moolchand.

THE COURT: It says in Webster against Moolchand although the awarding of prejudgment interest lies with the discretion of the judge, the allowance of prejudgment interest in maritime law is the rule rather than the exception. Your emphasis is on the latter part of that sentence but clearly the court, the Fifth Circuit in this case, enunciates the rule that the awarding of prejudgment interest lies with the discretion of the judge. I want you to show me a case in which it says the judge has no discretion in this area.

MR. HELLER: And add the last part of the line, this is the rule not the exception.

THE COURT: We can shorten this very easily. Is there any case among the cases that you provided to me whih indicates that there is no discretion on the part of the Court? Now if there is discretion, you can tell me why I should exercise my discretion to award prejudgment interest and then your adversary can tell me why I should exercise my discretion not to and I will make a decision.

MR. HELLER: Jones and Laughlin. It is the Supreme Court of the United States.

THE COURT: Why didn't you give it to me?

MR. HELLER: It is called Jones and-- I don't mean to be--

THE COURT: Why didn't you give it to me?

MR. HELLER: I didn't get the opportunity. I was checking all the circuits for you. It is quoted in one of the cases. Maybe it is quoted in Barnett, your Honor, but I remember--

THE COURT: Find it.

MR. HELLER: Barnett is the Ninth Circuit.

THE COURT: Well find it.

MR. HELLER: May I read from something I found?

THE COURT: Just a second. I want to get my copy.

MR. HELLER: I have something else. There are so many cases.

THE COURT: Just a minute. We will look for the quote from it. Just tell us in what case the Jones and Laughlin case is quoted from.

MR. HELLER: I think but I got another quote for you to keep you occupied, your Honor.

THE COURT: Give me the case.

MR. HELLER: Stissi versus Interstate and Ocean Transport.

THE COURT: Is this one of the cases you gave me?

MR. HELLER: Yes.

THE COURT: Just a minute. Go ahead.

MR. HELLER: Page 1927, your Honor. It says--

THE COURT: No extraordinary circumstance exists here to justify denying interest.

MR. HELLER: Prejudgment interest is awarded to the injured to make whole the injured party and then it goes on--

THE COURT: It says it is an abuse of discretion to deny prejudgment interest in admiralty cases except under extraordinary circumstances, is that correct?

MR. HELLER: Yes.

THE COURT: And this is Judge Nickerson of the Eastern District?

MR. HELLER: Yes, but that was affirmed. I don't have the citation.

I have here mention of Jones and McLaughlin in the Tellersio case versus Impressa, which is also a Second CIrcuit case, your Honor, in which they discussed prejudgment damages and they said in Jones and McLaughlin versus Feffer, they criticized the practice of dividing damage awards into pre and post judgment components and they

said this is easier. The plaintiff may then be awarded interest, they discuss the whole--

THE COURT: In Stissi all Judge Nickerson did was award interest on the portion of the award for loss of income.

MR. HELLER: No, he didn't. He awarded it on loss of society, absolutely. They all awarded-- it is one package. For example, your Honor--

THE COURT: Just a minute. Just a minute. I don't see-- I see on page 1928 he states that he awards 12 percent interest to compensate plaintiff for the loss of income.

MR. HELLER: Here is another one. For example under the Tozeler which some circuits--

THE COURT: I have enough. I think it is appropriate to award prejudgment interest.

MR. HELLER: Absolutely.

THE COURT: You want to be heard?

MR. MELITO: Yes. I think the rule in those federal cases is one of discretion because at least three or four legal reasons before you would get to that why it should not be granted. This issue has been waived in this case. We have been through 12 years of litigation and trial, a judgment, and appeal and now for the first time when we are trying to settle an amended judgment, the issues is raised. This is not a mere mathematical computation issue. This is an issue where you are being asked to ignore the New York State statute. You are being asked to apply some federal rule. There is not a single New York State case cite where any New York State law has ever done that. That is an issue that should have been litigated in full.

THE COURT: What else?

MR. MELITO: Second of all, this Court at the trial has already ruled dismissing all the maritime causes of action. Mr. Heller argued in the Appellate Division that was incorrect. That was upheld by the Appellate Division. This Court has thrown out the maritime claim.

THE COURT: What's the third?

MR. MELITO: The third reason is if in fact you could award interest in this case, it would solely be on the future damages, the Pickell case says that.

THE COURT: All right. In any event I don't think it is necessary for me to determine whether the issue of interest on the award is prejudgment interest has been waived. I don't think it is necessary for me to determine whether this is a maritime case. This is a case in which I concluded that a portion of the jury award was grossly excessive and reduced it to a figure that I thought was appropriate to compensate the plaintiff for his injuries. I allowed an award of a million and a half damages for loss of earnings to stand.

The Appellate Division in reviewing the record concluded that that was grossly excessive and reduced it to $750,000, presumably to compensate the plaintiff for that aspect of this injury.

It was my judgment that the amount of a million and a half dollars, which is what I reduced the award to, was appropriate to compensate the plaintiff for his injuries and I don't think it is appropriate to increase that amount by any prejudgment interest award.

With respect to the award for loss of earnings, the Appellate Division has already expressed an opinion as to the excessiveness of the jury award, which I didn't consider excessive and it would seem to me to be highly inappropriate, indeed almost a violation of the mandate of the Appellate Division, for me to add interest to the $750,000 figure that they set as the appropriate figure for loss of earnings.

Under the circumstances the plaintiff is entitled to enter a judgment for the award made by the jury as reduced by this Court and the Appellate Division with interest from the date of the jury verdict on the liability issue at nine percent.

MR. HELLER: I want to straighten out something your Honor said because we didn't ask for interest on the

future damages.

THE COURT: I don't care what you are asking for, it is my view that in view of the fact that both the trial court and Appellate Division had to reduce awards that were made by the jury to amounts which in my view with respect to one aspect of the case and with respect to another aspect of the case in view of the judges at the Appellate Division was an appropriate award, I certainly, vis-a-vis that award which I reduced, five million to one and a half million, would not think it would be appropriate to increase this award by awarding interest on that award at any point other than from the day that the jury found liability finding in favor of the plaintiff on the issue of liability and that rate should be the legal interest rate of New York State at nine percent.

With respect-- so that should plaintiff get more than that in my view that would be excessive, whether it is more because of prejudgment interest or because of any other factor. The Appellate Division has already determined that the appropriate amount of damages for the plaintiff vis-a-vis the loss of earnings is $750,000 and it would seem to me to be violative of that decision for me to increase that award by any prejudgment interest. The only interest that you are entitled to is the interest from the date of the jury verdict on the liability trial, the jury verdict in favor of the plaintiff up to the time that you entered your judgment.

MR. HELLER: May I ask your Honor just for the record, does your Honor for the record, state and I want to distinguish, is it your Honor's position that this is not a maritime case?

THE COURT: I am not expressing any opinion with respect to that.

MR. HELLER: That is very important.

THE COURT: I know, but I don't have to. I am assuming for the purpose of my decision one, that it is a maritime case. I'm not holding it is a maritime case at all.

I am assuming for the purpose of my decsion that you have not waived it. I am not holding it has not been waived because I don't have to reach that issue but assuming those two factors, I will not in the exercise of discretion which I think is inherent in this type of situation, award any prejudgment interest.

MR. HELLER: I wanted to make certin about the maritime--

THE COURT: I am not holding one way or the other.

MR. HELLER: You are not making any decision as to whether it is a maritime case or not?

THE COURT: Correct.

MR. HELLER: In view of the decision I recently gave your Honor in Stutto, does your Honor want to clarify this because your Honor being the trial judge, with all due deference to you, recognizes the accident happened on navigable waters.

THE COURT: There is no question the accident happened on a vessel on the water. Whether it is a maritime case or not, I am not ruling. I eliminated many causes of action in your complaint and submitted the case under a straight negligence theory to the jury.

MR. HELLER: I understand that.

THE COURT: It is a very simple question that the jury had to respond to.

MR. HELLER: I understand that your Honor eliminated the Jones Act, the statutory liability and the breach of warranty but the maritime issue was raised in the Second Department is very important.

THE COURT: The case you gave me of--

MR. HELLER: The Second Department, Stutto.

THE COURT: Reviewing Judge Arrons case.

MR. HELLER: Vaccaro.

THE COURT: A most distinguished jurist, a most distinguished jurist, Judge Vaccaro.

MR. HELLER: Every judge in the State Supreme

Court is distinguished. I just wanted to clarify it for the purposes of my right if I decide to appeal. I may not, but just to clarify it, your Honor, your Honor does recognize that accidents which occur on navigable waters even though it may be nonstatutory, it is still subject to federal maritime law.

THE COURT: I am not making any determination on that at all.

MR. HELLER: Just for the record so it would help me, your Honor.

THE COURT: I am not making any determination on that at all. I don't have to reach that issue.

MR. HELLER: But now, your Honor, I just want to be sure as far as the trial is concerned and your Honor presided over that trial, your Honor said you recognize that it occurred on navigable waters.

THE COURT: Nobody is disputing that it occurred on a vessel. A turbine exploded on a vessel. The vessel wasn't on land when it exploded.

MR. HELLER: I am not asking for interest on future lost wages.

THE COURT: Yes.

MR. HELLER: You recognize that?

THE COURT: Yes.

MR. HELLER: I am confining my prejudgment interest to the pain and suffering which occurred, your Honor recognizes that?

THE COURT: All right, I recognize that, yes.

Thank you all very much.

MR. MELITO: One question, are you--

THE COURT: This case has a number, 794. If you are going to communicate with me, please--

MR. MELITO: Are you signing--

THE COURT: Have you submitted a judgment?

MR. MELITO: Yes, a counterproposed judgment.

THE COURT: Does it contain the interest from the date of the jury verdict on the liability?

MR. MELITO: It has a provision.

THE COURT: Mr. Heller, can you make that computation?

Off the record.

(Discussion off the record.)

MR. HELLER: Judge Greenfield has granted prejudgment interest in a maritime case only.

THE COURT: Wasn't that for maintenance and cure?

MR. HELLER: But it still is a maritime case.

THE COURT: That is a little different.

MR. HELLER: It is still maritime law, with all due respect to the Court.

THE COURT: That's $155,582.64 a year. Off the record.

(Discussion off the record)

THE COURT: I am adding to the counterjudgment submitted by the attorneys for the defendant--

MR. HELLER: Are there costs on that?

MR. MELITO: Same costs as from the original judgment.

THE COURT: $300,935.18.

Let the record indicate that I have signed the proposed counterjudgment adding the appropriate amount of interest and costs and the total amount to which the plaintiff is entitled is $2,030,201.18.

* * * * *

Certified to be a true
and accurate transcript.

DAVID CHODOS
Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 27

JOSEPH P. DiIORIO,

Plaintiff,

-against-

GIBSON & CUSHMAN OF NEW YORK, INC., and GIBSON & CUSHMAN DREDGING CORPORATION,

Defendants.

Index
188/76

60 Centre Street
New York, New York
November 16, 1989

B E F O R E:

HONORABLE IRA GAMMERMAN

A p p e a r a n c e s:

KENNETH HELLER
Attorney for Plaintiff
335 Broadway
New York, New York 10013

SIFF, ROSEN & PARKER, P.C.
Attorneys for Defendant
233 Broadway
New York, New York 10279
By: IGNATIUS JOHN MELITO

David Chodos
Official Court Reporter

THE COURT: This is a motion by the Plaintiff to resettle the judgment in to add $600,000 to it, with appropriate interest, based on the claim by the attorney for the Plaintiff that inasmuch as this is a maritime case. The general obligations law Sec 1S-108 is not applicable to the settlement of $600,000 obtained by the Plaintiff for the same injuries against another party and now the Defendant against whom the judgment was recovered is not entitled to credit for that service.

THE COURT: This is a motion by the Plaintiff to resettle the judgment, in essence to add $600,000 to it, with appropriate interest, based on the claim by the attorney for the Plaintiff that inasmuch as this is a maritime case the general obligations law Sec 15-108 is not applicable to the settlement of $600,000 obtained by the Plaintiff for the same injuries against another party and now the Defendant against whom the judgment was recovered is not entitled to credit for that settlement.

We have two problems, Mr. Heller. The first is that my recollection is quite clear that there was a stipulation concerning the deduction of the $600,000 during the liability trial of this case.

If you examine that record, I am sure you will find it. The second is that in my view this is not a maritime case, and you have now put me to the position where I have to make that decision, although I don't think I have to make that decision now.

Under the circumstances, the motion is denied.

MR. HELLER: May I respond?

THE COURT: Of course.

MR. HELLER: Your Honor, with all due respect, your Honor is in error. There was no stipulation. I specifically said that $600,000 was paid, but I never stipulated to the deduction. With all due respect to the

Court, the reason by the motion was made is because there are other authorities that point out that the general obligations law, the outcome determinative conflicts with the federal maritime law on Garret versus Moore McCormick for releases. Since Garret versus Moore McCormick, the Supreme Court Decision says that the proving of any part of the release is an affirmative burden on the party asserting the release.

This Defendant, with all due respect to the Defendant, failed to do that during the trial.

THE COURT: No, no. Mr. Heller --

MR. HELLER: Yes.

THE COURT: This was a special verdict which went to the jury on special questions. To the extent that that was an issue not submitted to the jury, it is reserved to the Court, and there is ample proof on the record of the release, indeed there was a stipulation to that effect by you.

MR. HELLER: I point out, your Honor, I went through the record, and I never stipulated to deduct it. I stipulated that he receive --

THE COURT: That was before me on a number of occasions. The Defendant argued at one point that by executing the release the Plaintiff had waived his right to recover against the Defendant in this case, but in any event I concluded this is not a maritime case. This is straight negligence case.

MR. HELLER: I beg to differ.

THE COURT: Thank you all very much. This case is number 794. That number should appear on all communications to this Court.

* * * * *

Certified to be a true and accurate transcript of the proceedings.

David Chodos	So Ordered
Official Court Reporter	I.G.
11/22/89	J.S.C.

STATE of NEW YORK,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of December A.D. 1989

PRESENT, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-14 Mo. No. 1206
Joseph P. DiIorio,

Appellant,

v.

Gibson & Cushman of New York, Inc.

Defendant,

and Gibson & Cushman Dredging Corporation,

Respondent.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is dismissed upon the ground that movant is not aggrieved by the determination at the Appellate Division; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Donald M. Sheraw
Clerk of the Court

PRESENT:
Hon. IRA GAMMERMAN

Joseph P. DiIorio

-against-

Gibson and Cushman

INDEX NUMBER 1888/76
MOTION DATE
MOTION SEQ. NO. 011
TRIAL CAL. NO.

The following papers numbered 1 to read on this motion to

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits

Upon the foregoing papers it is ordered that this motion is denied for reason indicated in the record. L. Infeld. The cross-motion is denied.

It is so ordered.

Dated: 4/6/90

IRA GAMMERMAN
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 27

JOSEPH P. DI IORIO,

Plaintiff,

-against-

GIBSON AND CUSHMAN OF NEW YORK, INC., and GIBSON AND CUSHMAN DREDGING CORPORATION,

Defendants.

Index No.
1888/76

60 Centre Street
New York, N.Y. 10007
April 16, 1990

Before:

HONORABLE IRA GAMMERMAN, Justice

Appearances:

KENNETH HELLER, ESQ.
Attorney for Plaintiff
335 Broadway
New York, N.Y. 10013
BY: SUSAN HARMON, ESQ.
of Counsel

SIFF, ROSEN & PARKER, P.C.
Attorney for Defendants
233 Broadway
New York, N.Y. 10279
BY: IGNATIUS JOHN MELITO, ESQ.
of Counsel

Leonard Infeld, C.S.R.
Official Court Reporter

THE COURT: This case is number 794.

This is one of many motions that have been made in this case post verdict and judgment.

This motion seeks an order vacating the judgment entered in this matter on the ground that the plaintiff has not, in reality, consented to the reduction in damages ordered by the Court in response to a motion to set aside the verdict.

There was a verdict, I don't recall the exact amount, but the Court reduced the verdict and, indeed, the Appellate Division affirmed the award, but reduced -- as I recall the Court reduced damages for pain and suffering to a million and a half, and the damages for loss of earnings to a million and a half, and the Appellate Division further reduced that second million and a half to $750,000. And presumably, a judgment was entered with the Appellate Division decision.

Thereafter, a motion was made by the attorneys for the defendants seeking to set aside the judgment, on the ground that there was a release executed by the plaintiff at some point, which, in some way, released the defendants, claiming fraud.

In any event, in my view the motion had no merit and I denied it.

A motion of equally dubious merit was made by the plaintiff concerning prejudgment interests, particularly on

the award for conscious pain and suffering, and I indicated, in denying that motion, that if I had intended that that award was to draw prejudgment interest, I would have reduced it nor would I think the Appellate Division would affirmed that reduction.

In any event, presumably it is the appeal -- I assume --I know -- I have been advised that the defendant appealed from my decision denying its motion to vacate the judgment on the ground of release of fraud.

I presume, knowing Mr. Heller like I do, that he is appealing on behalf of the plaintiff, from my decision denying his application for a prejudgment interest.

Now the defendant is arguing that Mr. Heller's attempt to obtain prejudgment interest in some way appreciates the agreement that he entered into on behalf of his client, to accept the reduced damages, set both by this Court and the Appellate Division.

Is that correct?

MR. MELITO: Yes, your Honor.

I have the addition of two things. Can I speak for a moment?

THE COURT: Of course.

MR. MELITO: Thank you, your Honor.

The motion by defendants to set aside the verdict, on the ground of fraud, that was done a long time ago before the appeal. It was right after the verdict. And you denied that motion.

THE COURT: No, there was a motion that came after that, in connection with the release, or was the same motion?

MR. MELITO: That was after judgment, your Honor.

THE COURT: Oh. Okay.

MR. MELITO: Before the appeal.

THE COURT: Well, there couldn't be an appeal from a denial of that motion until I denied it.

MR. MELITO: Exactly, your Honor.

But that has been on for oral argument in the Appellate Division, apparently.

THE COURT: Well, there was an appeal from the original verdict and judgment, which was dealt with by the Appellate Division, as I have already indicated.

MR. MELITO: Exactly.

THE COURT: Affirmed in part, and, I guess, modified in part.

MR. MELITO: What happened here, after they ordered it reduced, and gave the plaintiff the opportunity to stipulate for the reduction or a new trial, he put in a stipulation adding prejudgment interest.

Your Honor rejected that, entered the amended judgment, without prejudgment interest, and he took an appeal.

Subsequently—this is what I think you left out in your recitation of the history—

THE COURT: Well, so much has happened in this case, it is hard to remember everything.

MR. MELITO: It is understandable your Honor.

Subsequently, plaintiff made another motion to amend the amended judgment to add back $600,000 that was taken off the verdict for the prior settlement.

Your Honor denied that motion as well.

THE COURT: Yes. You are right, there was another motion made by the plaintiff, on the ground that the defendant was not entitled to credit for the settlement obtained by the plaintiff from Eastern—what was it?

MR. MELITO: East Atlantic.

THE COURT: Well—

MR. MELITO: I'm not sure.

THE COURT: Well, there was a Jones Act action maintained by the plaintiff against his employer, which as settled back in 1973, or 1974, or '75 for the amount of $600,000.

MR. MELITO: Exactly.

Our point is simple, your Honor. He is now taking an appeal from that, and he has consolidated the appeals in

the Appellate Division

THE COURT: Is your appeal and his appeal consolidated?

MR. MELITO: No, your Honor.

THE COURT: Your appeal is going forward before his appeal is heard?

MR. MELITO: It should have been argued about two months ago, and it was put over by the Appellate Division.

THE COURT: Your appeal?

MR. MELITO: Yes.

It is our position that, followng the first appeal, the Appellate Division gave him two choices: Take the reduction or go back for a new trial.

It is our position that in ostensibly taking the reduction, but asking for an increase for prejudgment interest, asking to have the 600,000 put back, that in fact, he has not agreed to the reduction.

THE COURT: Well, he has agreed to the reduction. What he is arguing, unsuccessfully, at least up until this point, is that on the reduced amount, he is entitled to interest, certainly with respect to the pain and suffering aspect prior to the judgment, and that 1510(8) doesn't apply in this situation, because of the maritime aspect of the case.

That was my recollection.

MR. MELITO: That is right.

THE COURT: You have reminded me.

MR. MELITO: That is right.

THE COURT: And his problem with that is, there was a stipulation, as I recall, entered into during the—this case was tried first on liability and then on damages, and I think—my guess is—by best recollection is that the stipulation was entered into during the liability aspect of the case, because I wanted to know if, from counsel, if they thought it was necessary or appropriate to submit the potential liability of any other party, i.e., the party with whom the plaintiff entered into a settlement, to the jury,

in the course of the first trial on liability, and my recollection is that both Mr. Heller and the attorney then representing the defendant, agreed that it wasn't necessary, and the plaintiff—that the defendant would have received credit against any award in the amount of the settlement. But the record will or will not support me in that. I don't recall. I mean that was—

MS. HARMON: We respectfully except to your recollection.

THE COURT: My recollection is that Mr. Heller said that it is not in the record, but I haven't examined the record.

All right. It seems to me that this is just typical of a Kenneth Heller type of litigation. I don't think that his efforts to obtain interest, or now either go back on a stipulation, argue that 1510(8) doesn't apply, appreciated the stipulation that he entered into, agreeing to accept the reduced amounts both set by me and the Appellate Division.

So I see no basis for vacating the judgment and setting this matter down for a trial on the issue of damages, much as I would enjoy trying the case again.

MS. HARMON: Next time we will get ten million.

MR. MELITO: Just one additional point.

THE COURT: I mean, I don't know when the accident was. 1971, was it?

MR. MELITO: Yes, your Honor.

THE COURT: So it has only been pending 19 years. I don't know why it shouldn't go on a little longer.

Go ahead.

MR. MELITO: One point. It may not change you Honor's mind, but the $600,000 issue was before your Honor at trial. It was before the Appellate Division on the first appeal, and it was encompassed in the Appellate Division order.

I think by making another motion, and taking another appeal on that issue, I think he has not consented

to the Appellate Division order.

THE COURT: No, no, I think—I don't know if that issue was briefed before the Appellate Division.

MR. MELITO: It was, your Honor, and it is in the papers.

THE COURT: Before the Appellate Division?

MS. HARMON: Your Honor, there is a timing matter that Swager was not yet affirmed by the Appellate Division and that was after—that decision was long after the re-argument before you, so there is a legitimate question.

THE COURT: No, no, the case in Brooklyn that Mr. Heller cited to me, was a prejudgment interest case.

What was the case?

MS. HARMON: Well, there are many prejudgment interest cases. That is the general rule in the maritime law.

THE COURT: No, there was a Brooklyn case in which there was a—there was a Supreme Court case—if you tell me the name of the Judge, it will refresh my recollection—which was cited on the 1510(8) issue.

So, in essence, you are saying that it was dealt with in the previous appeal, but Mr. Heller is trying to get a second bite of the apple by virtue of—

MS. HARMON: No, no--

THE COURT:—by virtue of an affirmation of another case relating to 1510(8), and it is non-applicable in maritime cases?

MR. MELITO: That is correct.

THE COURT: All right. Well, that is not untypical of Mr. Heller.

All right. In any event, for the reasons indicated, the motion is denied.

Do you have anything to say, Ms. Harmon?

MS. HARMON: What about our cross motion for sanctions?

THE COURT: What is the cross motion?

MS. HARMON: For sanctions for bringing a

frivolous motion.

THE COURT: That is calling the kettle black.

I'm going to deny that motion as well.

MS. HARMON: Thank You.

MR. MELITO: Your Honor, will this transcript be the order of the Court, or should I submit an order?

THE COURT: —you are going to need a copy of this transcript, but the order will be—I will write on the gray sheet that the motion is denied, for the reasons indicated on the record. I will down the court reporter's name, and it is so ordered.

So you don't have to settle or enter an order.

You have to enter an order. This order will be entered automatically. You don't have to settle or submit an order.

MR. MELITO: Thank you, your Honor.

THE COURT: The cross motion is denied.

Certified to be a true
and accurate transcript.

Leonard Infeld, C.S.R.
Official Court Reporter

Sullivan, J.P., Carro, Kassal, Wallach, JJ.

41312-12A Joseph P. DiIorio,

Plaintiff-Appellant,

-against-

Gibson & Cushman of New York, Inc.,
et al.,

Defendants-Respondents.

41313 Joseph P. DiIorio,

Plaintiff-Appellant-Respondent,

-against-

Gibson & Cushman of New York, Inc.,

Defendant,

-and-

Gibson & Cushman Dredging Corporation,

Defendant-Respondent-Appellant.

Amended judgment, Supreme Court, New York County (Ira Gammerman, J.), entered on October 12, 1989, which awarded plaintiff the total sum of $2,030,201, and orders of said court and justice entered on November 24, 1989, and, on or about April 16, 1990, which, respectively, denied plaintiff's motion for further amendment of

the judgment, and denied defendant's motion to vacate the amended judgment, unanimously affirmed, without costs and disbursements.

As the question of pre-judgment interest was not presented to the jury in this maritime personal injury action, the court is without authority to award it. *(Pires v. Frota Oceanica Brasileira, S.A.,* AD2d , 554 NYS2d 855, 857; *Havis v. Petroleum Helicopters, Inc.*, 664 F2d 54, 55). Even without that rule, plaintiff's failure to seek pre-judgment interest in connection with the original judgment, which this court modified to reduce the award for future earnings (151 AD2d 402), would act as a waiver of any claim with respect thereto. As to whether $600,000, the amount of the earlier settlement in a related action against a non-party joint tortfeasor, should have been deducted from the damage award, our prior determination is the law of the case. *(See, Locilento v. John A. Coleman Catholic High School*, 134 AD2d 39, 43.) In any event, while plaintiff urges that maintenance and cure paid in exchange for a release cannot be deducted from a damage award, there is nothing in this record to suggest that the $600,000 was paid as maintenance and cure, which is "designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service" *(Vaughan v. Atkinson*, 369 US 527, 531); the $600,000 payment was made in connection with a broad general release executed in full settlement of the related action.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: November 20, 1990

FRANCIS X. GALDI
Clerk

At a term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, entered on February 7, 1991

Present - Joseph P. Sullivan, Justice Presiding
John Carro
Bentley Kassal
Richard W. Wallach, Justices

Joseph P. DiIorio,

Plaintiff-Appellant,

-against-

Gibson & Cushman of New York, Inc., et al.,
Defendants-Respondents.

Joseph P. DiIorio,

Plaintiff-Appellant-Respondent,

-against-

Gibson & Cushman of New York, Inc.,

Defendant,

-and-

Gibson & Cushman Dredging Corporation,
Defendant-Respondent-Appellant.

M-5766
M-9

Defendant-respondent-appellant having moved and plaintiff-appellant-respondent having cross-moved for

reargument of, or in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court entered on November 20, 1990 (Appeal Nos. 41312-12A and 41313),

Now, upon reading and filing the papers with respect to said motions, and due deliberation having been had thereon,

It is ordered that said motion and cross-motion be and they hereby are denied in their entirety.

ENTER:

FRANCIS X. GALDI
Clerk

STATE of NEW YORK,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of May A.D. 1991

PRESENT, HON. SOL WACHTLER, Chief Judge presiding.

1-10 Mo. No. 331
Joseph P. DiIorio,

Appellant-Respondent,

v.

Gibson & Cushman of New York, Inc., et al.,

Respondents-Appellants.

(And another related action.)

A motion having heretofore been made herein upon the part of the appellant-respondent and a cross motion having heretofore been made herein upon the part of the respondents-appellants both for leave to appeal to the Court of Appeals in the above causes, papers having been submitted on the motion and cross motion and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from that portion of the November 20, 1990 Appeliate Division order that affirmed the amended judgment, be and the same hereby is dismissed upon the ground that plaintiff, having stipulated to reduce the amount of damages to which he is entitled, is not a party aggrieved *(ee, Dudley v. Perkins*, 235 NY 448, 457); and it is

ORDERED, that the said motion otherwise be and the same hereby is dismissed upon the ground that that portion of the November 20, 1990 order that affirmed the denial of the motion for resettlement and the February 7, 1991 Appellate Division order do not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said cross motion for leave to appeal from that portion of the November 20, 1990 Appellate Division order that affirmed the denial of the motion for vacatur be and the same hereby is dismissed upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution.

Stuart M. Cohen
Deputy Clerk of the Court

Supreme Court, U.S.
FILED
SEP 13 1991
OFFICE OF THE CLERK

No. 91-241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH P. DI IORIO,

Petitioner,

vs.

GIBSON & CUSHMAN DREDGING CORP.,

Respondent,

GIBSON & CUSHMAN OF NEW YORK, INC.,

Defendant.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of New York Appellate Division, First Department

IGNATIUS JOHN MELITO
Counsel of Record
SIFF, ROSEN & PARKER, P.C.
Attorneys for Respondent
233 Broadway
New York, NY 10279
(212) 238-8400

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ARGUMENT

Certiorari should be denied since this is not a maritime case and therefore this Court lacks jurisdiction. Further, even if a federal question is presented, the decision below is proper 6

This is not a maritime case 6

Petitioner is not entitled to prejudgment interest. 7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH P. DI IORIO,

Petitioner,

vs.

GIBSON & CUSHMAN DREDGING CORP.,

Respondent,

GIBSON & CUSHMAN OF NEW YORK, INC.,

Defendant.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of New York Appellate Division, First Department

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Preliminary Statement

In this negligence case, petitioner Joseph P. DiIorio seeks a writ of certiorari to review the memorandum decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, dated November 20, 1990, officially reported at 561 N.Y.S.2d 767.

Statement of the Case

Petitioner claims that this is a maritime case and therefore he is entitled to prejudgment interest on the verdict, to be compounded, and that a previous settlement should not have been deducted from the judgment pursuant to New York General Obligations Law ("GOL") § 15-108. The trial court rejected petitioner's claim. The New York Supreme Court, Appellate Division, First Department, affirmed the trial court decision. Even this Court refused to disturb the reduction of the award pursuant to GOL § 15-108 by denying

petitioner a stay pending the filing and disposition of a petition for writ of certiorari in 1989.

This Court should similarly reject petitioner's request for certiorari. The case presents no significant issue of law, let alone an issue of federal law. This is not a maritime case but rather an ordinary negligence case. Even if maritime law governed, the same results as those reached below would obtain. As the New York Appellate Division recognized, the issue of prejudgment interest was waived by the failure of petitioner to raise it until nearly 13 years after the action was commenced and almost two years after judgment was rendered. Since petitioner is not entitled to such interest, the issue of whether the interest is to be compounded is irrelevant. Similarly, the deduction from the judgment of the previous settlement would be warranted under either maritime law or New York law.

In an attempt to engender sympathy and to manufacture issues for this Court to review, petitioner characterizes himself as the victim of a court harboring hostility towards any maritime doctrine. The fact is, however, that the application of, or the failure to apply, maritime law did not result in petitioner's claims being rejected below. The fact that the claims were meritless under either maritime or New York law dictated the result.

Statement of Facts

Petitioner, an oiler on a barge, was injured in a 1973 explosion of a steam turbine. Thereafter, petitioner commenced the instant action, seeking recovery for his injuries from respondent Gibson & Cushman Dredging Corporation, which had contracted to perform dredging work and subcontracted the job to petitioner's employer, Atlantic Gulf & Pacific Company (4).* Petitioner commenced a separate action against his employer under the Jones Act, which he settled in 1975 for $600,000.

* Numbers in parentheses refer to pages of the Petition for Writ of Certiorari.

Following a trial before the Supreme Court, County of New York (Gammerman, J.), a jury verdict awarding petitioner $6,578,696 was rendered on December 29, 1987 (3a). In response to defendant's post-trial motion, the trial court conditionally reduced the pain and suffering component of the award from $5,000,000 to $1,500,000 and, pursuant to GOL § 15-108, deducted $600,000 from the award to account for petitioner's previous settlement with his employer, a non-party joint tortfeasor (4a). On February 8, 1988, and upon petitioner's consent to the reduction of the pain and suffering award, a judgment of the Supreme Court, New York County (Gammerman, J.), was entered in the amount of $2,478,696, reflecting the reduced award (18a).

Defendant subsequently appealed the judgment to the Appellate Division, First Department, which, after full briefing and oral argument, reversed the judgment and granted a new trial on damages unless petitioner would stipulate to reduce the future lost earnings component of the award from $1,500,000 to $750,000. The court otherwise affirmed the judgment, rejecting petitioner's cross-appeal which sought reinstatement of the full pain and suffering award and reinstatement of the $600,000 which had been deducted due to the prior settlement (22a). Among the issues raised by petitioner in his cross-appeal and rejected by the court was that maritime law applied to this case, and the trial court had erred in dismissing petitioner's claims under maritime law and in sending the case to the jury solely on the theory of common law negligence. The court's opinion expressly stated: "We have considered the other issues raised by these cross-appeals and find that they are without merit (25a)."

Petitioner thereafter moved in the New York Court of Appeals for leave to appeal from the appellate court's June 27, 1989, order, requesting another stay of the order. The Court of Appeals (Alexander, J.) declined to grant the stay and later denied the motion for leave to appeal.

Petitioner then made an unsuccessful application to this Court for a stay pending the filing and disposition of a petition for a writ of certiorari. The application was denied by the Court (Marshall, J.) on September 29, 1989 (31a).

Petitioner's counsel purported to stipulate to the New York Appellate Division's reduction on September 28, 1989 (28a). Petitioner had not mentioned prejudgment interest up to this point.

Petitioner's efforts to increase the award by his belated claim for prejudgment interest.

On September 29, 1989, petitioner served a notice of settlement of his proposed amended judgment. Although the amended judgment was supposed to reflect the appellate court's $750,000 reduction, petitioner actually sought entry of a judgment in the amount of $4,514,034, an amount more than $2,000,000 higher than the judgment petitioner purportedly consented to reduce. Petitioner had improperly inflated the proposed amended judgment by adding prejudgment interest dating from the 1973 accident. Petitioner for the first time claimed such interest was appropriate since this was purportedly a maritime case, even though every court had rejected his maritime claim and even though no New York State case had permitted such interest even in a maritime case. The trial court correctly rejected the addition of prejudgment interest, finding no basis to support such interest (38a). The court did not find it necessary to determine whether this was a maritime case or not for these purposes (43a-46a).

Defendant's counter-proposed amended judgment in the total amount of $2,030,201.18 was accordingly signed on October 5, 1989, and entered October 12, 1989.

Petitioner's subsequent attempt to increase the amended judgment.

Several days after the amended judgment was entered, by notice of motion dated October 27, 1989, petitioner moved the lower court to amend the amended judgment to add back the $600,000 the court previously subtracted from the jury award pursuant to GOL § 15-108 even though the appellate court, the New York Court of Appeals and this Court had previously refused to disturb the reduction. Petitioner also sought prejudgment interest on the $600,000. The lower court rejected petitioner's argument that the General Obligations Law was inapplicable, denying the motion (48a).

Decision at issue herein.

The petitioner again appealed to the Appellate Division, First Department, the issues raised here (61a).

That court rejected petitioner's claim, ruling as follows:

> As the quesion of prejudgment interest was not presented to the jury in this maritime personal injury action, the court is without authority to award it. (*Pires v. Frota Oceanica Brasileira, S.A.*, ___ A.D.2d ____, 554 N.Y.S.2d 855, *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54, 55). Even without that rule, plaintiff's failure to seek prejudgment interest in connection with the original judgment, which this court modified to reduce the award for future earnings (151 A.D.2d 402), would act as a waiver of any claim with respect thereto. As to whether $600,000, the amount of the earlier settlement in a related action against a non-party joint tortfeasor, should have been deducted from the damage award, our prior determination is the law of the case. (*See, Locilento v. John A. Coleman*

Catholic High School, 134 A.D.2d 39, 43.) In any event, while plaintiff urges that maintenance and cure paid in exchange for a release cannot be deducted from a damage award, there is nothing in this record to suggest that the $600,000 was paid as maintenance and cure, which is "designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service" (*Vaughan v. Atkinson,* 369 U.S. 527, 531); the $600,000 payment was made in connection with a broad general release executed in full settlement of the related action (62a).

ARGUMENT

Certiorari should be denied since this is not a maritime case and therefore this Court lacks jurisdiction. Further, even if a federal question is presented, the decision below is proper.

This is not a maritime case.

Petitioner's claim, and the basis of this Court's jurisdiction, rests on the threshold issue of whether federal maritime law is controlling in this case. That issue has no merit.

Petitioner, relying on *Senko v. LaCrosse Dredging,* 352 U.S. 370 (1957), argues that the fact that accident occurred on board a ship requires the application of the federal maritime law (10). However, *Executive Jet Aviation Corp. v. City of Cleveland,* 409 U.S. 249 (1972), makes clear that while a maritime location is one factor in determining whether maritime law is applicable, the action must also have a maritime nexus, the existence of which turns on an examination of the case in light of traditional concepts of the role of admiralty law, the function and role of the parties, the types of vehicles and instrumentalities involved, and the causation and nature of the injury suffered.

Petitioner has failed to demonstrate that such factors warrant the application of federal maritime law in the instant case. Since petitioner cannot establish that maritime law must be applied to his case, his claims that he is entitled to prejudgment interest and a double recovery of the $600,000 he previously received from his employer must fail. Furthermore, even if maritime law applied to this case, there is no merit to petitioner's claims.

Petitioner is not entitled to pre-judgment interest.

Petitioner has entirely failed to establish that the appellate court's failure to grant prejudgment interest on his award was erroneous. Petitioner argues that the appellate court decision was based on a case that was reversed (8). However, petitioner overlooks the crux of the court's ruling, namely that petitioner's failure to raise his claim for prejudgment interest until nearly 13 years after the action was commenced or in connection with the original judgment constitutes a clear waiver of the claim under general principles of waiver and estoppel.

Before petitioner raised his claim for prejudgment interest, the case had been tried and a judgment had been entered and an appeal of the judgment heard and decided. It was only when faced with the court's reduction of the verdict, to which petitioner tried to avoid stipulating for several months, even seeking relief from this Court, that he sought to add nearly $2.8 million in prejudgment interest to the amended judgment which was being settled. Such a thirteenth-hour claim of entitlement to prejudgment interest, made to the complete surprise of both defendant and the trial court, long after the first judgment had been entered without pre-judgment interest, was merely a transparent attempt by petitioner to compensate for what he believed was the unwarranted reduction of his award by the New York State trial and appellate courts. Such a scheme should not be countenanced.

Furthermore, as the trial judge recognized in denying petitioner prejudgment interest, both his reduction of the award and the appellate court's reduction were based on the conclusions, made after careful examinations of the record, that the amount of the jury award was grossly excessive. Thus, the massive increase in the award petitioner sought by the addition of prejudgment interest would have been inappropriate and at odds with the appellate court's intention in making the reduction (43a-44a).

Petitioner is not entitled to have the amount of the prior settlement added back to the judgment.

Petitioner previously raised the issue of whether he was entitled to reinstatement of the $600,000 previously deducted from his award because of his 1975 settlement of his Jones Act claim against his employer (22a). After the appellate court rejected that claim, this Court denied petitioner a stay pending the ruling and disposition of a petition for a writ of certiorari (31a).

Petitioner's claim should again be rejected as without merit. Firstly, this is not a maritime case, so there is no basis for petitioner's claim that GOL § 15-108 cannot be applied and that *Garrett v. Moore-McCormack* governs.

In any event, petitioner's claim that the $600,000 settlement represented maintenance and cure, a claim also rejected by the New York appellate courts, is similarly without merit. Maintenance and cure are limited to the right of a seaman to food and lodging if he falls ill, plus necessary medical services. *Gardener v. Sea-Land Service, Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986). As the appellate court recognized, "there is nothing in the record to suggest" anything other than that the $600,000 petitioner received was to settle his personal injury claim (62a). Therefore, the lower courts properly refused to reinstate it in the judgment.

That being established, a procedural statute such as GOL § 15-108 would be applied even if maritime law governed. *See Wilson v. United States,* 613 F.Supp. 1322 (E.D.N.Y. 1985) (effect of release under Federal Tort Claims Act governed by GOL § 15-108). Petitioner's claim that the decision in *Swogger v. Waterman Steamship Corp.,* 151 A.D.2d 100, 546 N.Y.S.2d 80 (1st Dep't 1989), made clear that the GOL is not applicable to maritime cases is erroneous (16). *Swogger* dealt only with the issue of whether contribution and indemnification claims of vessel owners sued for the alleged wrongful asbestosis death of a marine engineer were governed by federal maritime law or GOL § 15-108. The court did not consider the issue (which it had previously ruled on in the instant case) of whether the proceeds of a settlement received from a joint tortfeasor should be deducted from the judgment.

Furthermore, the law is clear that even under maritime law a double recovery such as petitioner here claims would not be permitted. Federal maritime law, like the GOL, provides that any judgment must be reduced by the amount of prior settlements. *Self v. Great Lakes Dredge & Dock Co.,* 832 F.2d 1540 (11th Cir. 1987), *cert. denied,* 486 U.S. 1033 (1988); *Leger v. Drilling Well Control, Inc.,* 592 F.2d 1246 (5th Cir. 1979). The underlying basis for the rule mandating reduction of judgments by the amount of prior settlements under both the GOL and federal maritime law is that a plaintiff should not receive a double recovery. *See United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975); *Leger v. Drilling Well Control, Inc., supra; Bordelon v. Consolidated Georex Geophysics,* 628 F. Supp. 810 (W.D. La. 1986). Such an impermissible double recovery is exactly what would occur here if the $600,000 petitioner already received was added back to the judgment.

In this case the deduction was proper. Under GOL § 15-108, a judgment recovered by a plaintiff must be reduced either by the amount of any settlement received from a joint

tortfeasor, or by the amount of the apportioned share of the settling tortfeasor's liability, whichever is greater. In this case it is undisputed that petitioner sued his former employer, Atlantic Gulf & Pacific, under the Jones Act to recover for the same injuries involved in this action, and that he settled that suit for $600,000. That being so, and since the issue of Atlantic Gulf & Pacific's apportioned share of fault was never submitted to the jury, the lower courts properly reduced the award by the $600,000 settlement.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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September 11, 1991

(3)

No. 91-241

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IN THE
Supreme Court of the United States
October Term, 1991

JOSEPH P. DIIORIO,

Petitioner,

vs.

GIBSON & CUSHMAN DREDGING CORP.,

Respondent,

GIBSON & CUSHMAN OF NEW YORK, INC.,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF OF PETITIONER

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IN THE
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JOSEPH P. DIIORIO,

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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

This brief is submitted in reply to the opposing brief of the Respondent. The facts have been fully developed in the petition and in the opposing briefs and need not be repeated. We shall, therefore, proceed directly to a discussion of the law.

POINT I

THIS IS A MARITIME CASE. PREJUDGMENT INTEREST SHOULD THEREFORE BE AWARDED.

Respondent argues that this is not a maritime case. Therefore, says respondent, this court lacks jurisdiction. Of course, this approach, if valid, allows respondent to sidestep the issue of prejudgment interest. In fact, respondent has done just that.

The contention that this is not a maritime case is manifestly absurd. Indeed, the Appellate Division of the New York State Supreme Court for the First Department, stated, in this case:

> "As the question of prejudgment interest was not presented to the jury *in this maritime personal injury action* *** (emphasis supplied)."

Of course, this determination by the Appellate Division that it was, indeed, dealing with a maritime personal injury action is in line with settled authority. It is undisputed that petitioner, a wiper aboard the dredge PITTSBURGH, sustained massive personal injuries when that vessel's steam turbine exploded. The PITTSBURGH was then engaged in a United States Army Corps of Engineers Dredging Project in the Cape Fear River, North Carolina. It is equally undisputed that the Cape Fear River, at that point, is a navigable waterway.

Where the situs of an injury is in a vessel on navigable waters, whether the vessel is docked or underway, maritime law applies. In maritime cases, the award of prejudgment interest is the rule rather than the exception. *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1042-43 (5th Cir. 1983); *Webster v. M/V Moolchand,* 730 F. 2d 1035, 1040 (5th Cir. 1984); *Barnett v. SeaLand Services,* 875 F. 2d 741, 746-747 (9th Cir. 1989) and *Taliercio v. Cia. Empresa S.A.*, 761 F. 2d 126, 129 (2d Cir. 1985).

The respondent is apparently confused by the fact that the Trial Court submitted the case to the jury as a land-based common-law negligence case, rather than as a maritime personal injury case. That was done over petitioner's objection and cannot change the character of the case. At no time did petitioner acquiesce in the Trial

Court's erroneous submission of the case to the jury as a land-based negligence case.

As we pointed out in the petition herein, while the weight of authority in the lower federal courts is in favor of awarding prejudgment interest in maritime personal injury cases, there is a conflict. Some courts have held to the contrary.

This is an important issue. The lower federal courts, and the state courts which have concurrent jurisdiction in these cases, are understandably confused on this issue. It is, therefore, respectfully submitted that the writ should issue to resolve this question.

POINT II

THERE WAS NO WAIVER.

The fact that the question of prejudgment interest was not presented to the jury is meaningless. The Appellate Division misconstrued *Havis v. Petroleum Helicopters Inc.*, 664 F.2d 54 (5th Cir. 1981). In that case, the Court awarded prejudgment interest, at the rate prescribed by the state having the most contact with the case, despite the fact that the matter of interest had not been submitted to the jury. A later case in the same circuit, *Morales v. Garijak Inc.*, 829 F. 2d 1355 (1987), somehow came to the conclusion that *Havis, supra,* held that if the issue of interest had not been submitted to the jury, it could not be awarded.

Relying primarily on *Morales,* the Appellate Division held, in *Pires v. Frota Oceanica Brasileira, S.A.*, 554 NYS 2d 855, 857 (1990) that the issue of prejudgment interest must be submitted to the jury. That holding is, of course,

plainly contrary to law. In fact, in a very recent decision, *Escobar v. Seatrain Lines, Inc.*, New York Law Journal, August 26, 1991, copy of which is annexed hereto, the Appellate Division impliedly abandoned the position it had taken in the instant case and in *Pires, supra,* and squarely held that where the injury occurs on a vessel in navigable waters, the award of prejudgment interest is the rule rather than the exception. In that case, the issue of prejudgment interest had never been submitted to the jury. Obviously, it is a pure question of law, to be decided by the Court.

"Waiver" is generally defined as the voluntary and intentional relinquishment of a known right. See 28 Am. Jur. 2d, "Estoppel and Waiver," Sec. 154. The fact that petitioner did not seek prejudgment interest in connection with the earlier judgment, which was modified by the Appellate Division to reduce the award for future earnings (151 AD 2d 402) cannot, as a matter of law, operate as a waiver of petitioner's right to prejudgment interest.

The Trial Court and Appellate Court had persistently rejected petitioner's argument that this was a maritime law case. (9a, 10a, 39a, 42a, 44a, 49a, 58a) and that state procedural statutes, including the General Obligations Law 15-108 (10a, 11a, 20a, 49a) and state interest statutes (29a, 39a, 44a, 49a, 54a, 55a, 57a, 58a) did not apply.

Until the Appellate Division belatedly remodified its June 27, 1989 Order (22a-25a) by expressly ruling as a matter of fact and law that this was a maritime personal injury action, petitioner could not argue before this Court that petitioner was entitled to maritime pre-judgment interest on the verdict and that the state General Obligations law did not apply because it conflicted with maritime law. The June 27, 1989 Order applied land based tort law. The Appellate Division's November 20, 1990 Order (61a-62a)

was subsequent to the U.S. Supreme Court's denial of petitioner's application for a stay on September 29, 1989 (31a). All the Trial Court and Appellate Court orders prior to November 20, 1990 no longer constitute "law of the case" on the factual and legal question of whether maritime law applies.

Respondent's argument to invoke Waiver (or laches), alleging it is prejudiced by petitioner's alleged 13 year failure to ask for pre-judgment interest (Brief in Opposition, p7), is facetious. There is no pleading requirement for maritime pre-judgment interest, and a demand for same prior to any award is premature.

There was no surprise to respondent, engaged in the maritime business of dredging navigable waters for approximately fifty years, that petitioner DiIorio, an oiler on their dredge (Respondent Opposition Brief p. 2), and a Jones Act seaman, would argue maritime law applied to him, with all its consequent rights and protections.

The omission on that earlier occasion, to add prejudgment interest could not possibly have prejudiced the respondent in any way. Moreover, at that time, the trial court's insistence on treating this as a land-based negligence case precluded counsel from requesting prejudgment interest. A reading of the colloquy between counsel and Justice Gammerman on January 13, 1988 (4a et seq.) will demonstrate that, in any event, it would have been futile, at that time, for petitioner to have even mentioned prejudgment interest. As can be seen, from a reading of the colloquy, Justice Gammerman persisted in his mistaken view that this was a land-based negligence case and not a case of maritime personal injury. That being the case, for Counsel to have persisted would simply have been pointless.

The following is stated in 28 Am. Jur. 2d "Estoppel and Waiver," Sec 158:

> "Waiver is mainly or essentially a matter of intention. *** Mere negligence, oversight or thoughtlessness does not establish a waiver."

It is not the purpose of the law to penalize a litigant for an inadvertent error, nor is it the law's purpose to perpetuate error. Thus, the fact that petitioner's attorney did not seek prejudgment interest on the earlier occasion is meaningless and should be treated accordingly.

POINT III

MAINTENANCE AND CURE CANNOT BE DEDUCTED PURSUANT TO A STATE PROCEDURAL STATUTE IN A SEAMAN'S FEDERAL MARITIME LAW CASE FOR PERSONAL INJURY DAMAGES.

Respondent recognized that maintenance and cure, payable only by the shipowner, is money sufficient to provide a seaman with food, lodging and necessary medical expenses (Respondent's Brief, p. 8).

Petitioner incurred enormous hospital and medical expenses due to the severity of his injuries. Petitioner's maintenance and cure settlement of $600,000 against the shipowner paid for these special damages.

Petitioner's maritime personal injury action against respondent for damages awarded petitioner past and future wage losses and pain and suffering (Petitioner's Appendix, 3a). Petitioner seaman did not seek a "double recovery" award of special damages to again pay for his

hospital and medical bills because the maintenance and cure settlement against his employer paid for the "special damages." The trial court, Justice Gammerman, recognized this and did not include a "question for the jury" to award special damages for medical expenses which is routine in all personal injury cases.

The subsequent November 20, 1990 Appellate Division order, ruling this is a maritime personal injury case, requires that no state procedural statutes, including N.Y. G.O.L. Sec. 15-108, defeat seaman DiIorio's substantive maritime rights.

Justice Gammerman's $600,000 deduction pursuant to N.Y. G.O.L. Sec. 15-108 violates that precept. *Lerner v. Karageorgis Lines, Inc.*, 66 NY 2d 479 (1985).

CONCLUSION

THE WRIT OF CERTIORARI SHOULD ISSUE

Respectfully submitted,

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Dated: New York, NY
September 20, 1991

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Mrs. Nery Escobar, individually and on behalf of two infants, Sergio Escobar, Jr., and Gilda Morejon as next of kin of Sergio E. Escobar, deceased,

Plaintiff-Respondent,

against

Seatrain Lines, Inc.,

Defendant-Appellant.

Judgment, Supreme Court, New York County (Edward Greenfield, J.), entered March 29, 1990, after a jury trial, in favor of plaintiff in the amount of $8,436,798.25, including interest and costs, unanimously reversed, on the law and on the facts, and a new trial before a different justice is ordered on the issue of damages, without costs. Appeals from the orders entered on or about July 18, 1986, April 27, 1988, February 28, 1990 and March 27, 1990, are dismissed as subsumed in the judgment without costs. Motion No. 2291/1991 to strike a portion of plaintiff's brief is unanimously denied.

This action arises from the death of a longshoreman engaged in maritime employment on board a vessel, on navigable waters, and so is governed by the Longshore and Harborworkers' Compensation Act, 33 USC §901 *et seq.* (the Longshore Act) and Federal maritime law *(Tibak v. City of N.Y.*, 154 AD2d 313, app. den. 75 NY2d 705; *Stuto v. Coastal Dry Dock & Repair Corp.*, 153 AD2d 937, lv. to app. dism., 75 NY2d 865). After a trial held in 1986, a jury found defendant liable, awarded damages of $869,000, but found decedent 70% negligent, resulting in an award of $260,700.

On January 26, 1989, we affirmed without opinion the trial court's order dismissing defendant's contributory negligence defense and setting aside the verdict as inadequate, and ordered a new trial on damages only (146 AD2d 973). Upon re-trial in May 1989 a jury awarded plaintiff $600,000 for past pecuniary loss, $2,400,000 for future pecuniary loss (which included $500,000 lost Social Security benefits), $2,000,000 for loss of society, and $250,000 to each of the decedent's two children for loss of nurture and care, which was reduced to $75,000 each by the trial court (566 NYS2d 813). For reasons that follow, we are constrained to reverse the judgment entered in the amount of $5,150,000 plus interest of $3,285,953.25, plus costs and disbursements of $845, for a total of $8,436,798.25, and order a new trial on damages.

Ordinarily, establishing a decedent's future earnings, had he lived, is based upon the decedent's actual earnings history. Here, however, plaintiff was apparently discouraged by what the decedent's earning history would have yielded because the decedent, aged 47 at the time of his death in 1977, had never earned more than $26,588 in any one year, and in the five years preceding his death had earned $17,930 in average yearly salary. The trial court permitted plaintiff to equate decedent's earnings to those of one Juan Fernandez, who was not only qualified as an ordinary longshoreman, or "hold man" (as was the decedent), but also a straddle carrier and crane operator, and who had average yearly earnings of $38,981 in the four years after 1977. In the contract year closest to decedent's death, Fernandez had earned $41,311, which is 55% more than decedent's highest annual salary of $26,588. This fatally tainted the jury's verdict which awarded $600,000 in lost wages from February 1977 through May 1989 (averaging $48,980 annually), and $1,900,000 from May 1989 to decedent's projected retirement at 70 years of age (averaging $172,727 annually).

The award was grossly excessive, and was apparently accomplished through the testimony of plaintiff's economic expert, Dr. Edmund Mantell. (Plaintiff also read excerpts from the testimony of the late Eugene Spector, plaintiff's other economist at the first trial.) We observe that Dr. Mantell's testimony as an expert witness was cited by the Second Circuit Court of Appeals, which held, in reversing a judgment for pecuniary loss of a decedent's wife and children, that "[t]he most prejudicial of [the errors occurring in the course of the trial] was allowing the jury to consider as evidence Dr. Mantell's lengthy, extravagant, and non-probative projections of Dr. Lin's future income." *(Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F2d 45, 49 [1984]. Just nine months before that, the Second Circuit found Dr. Mantell's proposed testimony to be "highly suspect" and "riddled with errors," and affirmed the determination of the District Court to exclude his testimony after it had noted "a number of assumptions and assertions made by Dr. Mantell that were so unrealistic and contradictory as to suggest bad faith." *(Shatkin v. McDonnell Douglas Corp.*, 727 F2d 202, 208 [1984]).

In the case now before us, Dr. Mantell projected that decedent would earn an average of $56,111 per year through 1989, and $145,686 per year until the year 2005 when decedent would have been 75 years of age. Dr. Mantell's testimony was improperly founded upon comparison of the earnings and work history of Mr. Fernandez, whose qualification and earning history were substantially different from the decedent's. Dr. Mantell's $4,016,400 projection of decedent's survivors' total economic loss was in our view highly speculative, and denied the defendant a fair trial.

If we were not reversing on the grounds of Dr. Mantell's testimony, we would nevertheless have reversed on the basis of plaintiff's counsel's personal attacks on the

defendant's trial attorney, and prejudicial appeals to the jury's passion and sympathy through the introduction of irrelevant evidence *(see, Berkowitz v. Marriott Corp.*, 163 AD2d 52). Several examples from plaintiff's attorney's summation are illustrative of the type of prejudicial statements made by plaintiff's counsel that warrant reversal in this case:

> Forget [defense counsel], forget his face. [Counsel] is only a facade, that behind that facade is the real Seatrain, the real Seatrain, the one that killed Sergio Escobar, and the one who has done everything you've heard of from the witnesses in this courtroom for many years. That's the real Seatrain.
>
> I want you to put aside that nice, friendly, affable gentleman because that's not the contest. The decision is is Seatrain responsible and for how much. So forget the Madison Avenue seller.
>
> Now, for example, in the orient they have professional criers, professional mourners that come to every funeral and cry and apologize and feel sorry. [Counsel] is a professional mourner here that was sent here by Seatrain so you will forget the real face of Seatrain. The real face of the company that did this. [Counsel] is the facade.
>
> Now, the purpose of his nice, friendly, gentle affable presence is to make you forget. I want you to remember. I also want you to remember that he wouldn't allow any of us to tell you how Sergio died.

* * *

> [Counsel] is the master of the half-truth, the inuendo [sic], what might be, what may be, what possibly could be, everything that's intended to raise the specter of doubt in your mind as to the realities that they killed him and its their obligation to pay.

After addressing similar conduct, the Appellate Division, Fourth Department stated, in words particularly applicable to counsel's conduct herein: "It is time that the bar should realize that when counsel in a close case resort to such practices to win a verdict, they imperil the very verdict which they thus seek. [citations omitted] The misconduct was repeated. It cannot be deemed inadvertent or harmless." *(Cherry Creek Nat. Bank v. Fidelity & Cas. Co. of N.Y.*, 207 App. Div. 787, 791; *see, also, Adams v. Acker*, 57 AD2d 741, 742, on reh. 58 AD2d 754, apps. dism. 42 NY2d 965 and 42 NY2d 1050). "When misconduct of counsel in interrogation or summation so violates the rights of the other party to the litigation that extraneous matter beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned." *(Kohlmann v. City of N.Y.*, 8 AD2d 598).

In addition to the attacks on defense counsel, and improper references to matters dealing with liability, which issue was not before that court, plaintiff's counsel also introduced into evidence extensive prejudicial testimony with respect to mourning, grief and psychiatric problems experienced by decedent's widow and daughter, which may have been responsible for the inflated award of $2,000,000 for loss of society. In *Sea-land Services v. Gaudet*, (414 US 573, 585), the Supreme Court held that although the widow and defendants of a deceased longshoreman are entitled to recover for loss of support, services (including nurture, training, education and guidance) and society, "[l]oss of society must not be confused with mental anguish or grief, which is not compen-

sable under the maritime wrongful-death remedy." (*id.* fn. 17).

Were we not reversing and remanding for a new trial on damages for the reasons stated above, we would have further reduced the awards (as reduced by the trial court) of $75,000 to each of decedent's two children, who were aged 19 and 20 at the time of his death. First, we reject defendant's contention that because the Estates, Powers and Trust Law, §1-2.9-a, reduced the age of majority from 21 to 18 years, the children were not entitled to recover anything. As noted in the New York Pattern Jury Instructions-Civil (PJI 2:320, 1990 Cumulative Supplement, Comment, p. 493) statutory authority continues to make parents responsible for their children's support to age 21 (Family Court Act, §413[1][a]; Domestic Relations Law, §32[3]). The law in New Jersey, where the children were domiciled, is not necessarily to the contrary (*see, Newburgh v. Arrigo*, 88 NJ 529, 443 A2d 1031, 1037-1038).

Nevertheless, there was insufficient evidence to support a $75,000 award for nurture and care prior to age 21 of Gilda Morejon, who was six months short of her 21st birthday, and Sergio Escobar, Jr., who was one year and six months short of his 21st birthday at the time of decedent's death. (*See, Red Star Towing and Transp. Co. v. "Ming Giant"*, 552 F Supp 367, 377-378 [SDNY 1982]; *De Centeno v. Gulf Fleet Crews, Inc.* 798 F2d 138 [5th Cir. 1986]). *Gonzalez v. NY City Housing Auth.* (__NY2d__, No. 58 decided April 25, 1991, [1991 N.Y. LEXIS 618]), cited by the plaintiff, does not call for a contrary result. In *Gonzalez* there was considerable evidence of the nature and pecuniary value of the services rendered by decedent to her grandchildren at the time of her death, whereas in the instant case the evidence centered upon decedent's nurture and care of his children when they were very young, in Cuba and Spain.

We find that the trial court erred in refusing to permit cross examination of Dr. Mantell about the present value of the loss of decedent's future earnings. If there is a retrial on the issue of damages, (i.e. if the parties cannot reach a reasonable settlement of this unconscionably long lawsuit), the ascertained future income and benefits that decedent would have received must be discounted to present value in making up the award, and since the lump-sum damages award is tax-free, the relevant stream of income that the damages award replaces should be calculated as after-tax wages and benefits (*Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 533-537). Social Security taxes shall also be deducted in computing future earnings, since the plaintiff should not be permitted to recover Social Security benefits the decedent would have received without taking into account the cost of those benefits (*Tallentire v. Offshore Logistics*, 754 F2d 1274, 1287, rev'd on other gds. 477 US 207, on remand, 800 F2d 1390, 1392).

With respect to the trial court's award of prejudgment interest, we agree that where the situs of the injury is on a vessel in navigable waters, whether the vessel is docked or under way, maritime law applies, and that in maritime cases the award of prejudgment interest is the rule, rather than the exception (*Helaire v. Mobil Oil Co.*, 709 F2d 1031, 1042-43 [5th Cir. 1983]; *Webster v. M/V Moolchand*, 730 F2d 1035, 1040 [5th Cir. 1984]; *Barnett v. Sea Land Service*, 875 F2d 741, 746-747 [9th Cir. 1989]; *Taliercio v. Compania Empressa L.a.*, 761 F2d 126, 129 [2d Cir. 1985]; *see, generally*, Anno: Award of Prejudgment Interest in Admiralty Suits, 34 ALR Fed. 126).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: August 22, 1991

Francis X. Galdi

Clerk